

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARIANO JUAREZ ROSALES . H-03-CV-1016
vs. . HOUSTON, TEXAS
NATHANIEL QUARTERMAN . APRIL 28, 2008
NATHANIEL QUARTERMAN . 1:30 P.M.
.

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE VANESSA GILMORE
UNITED STATES DISTRICT JUDGE
VOLUME 1 OF 2

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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12 ALSO PRESENT:

13 Mariano Rosales (By Video teleconference)

14 Proceedings recorded by mechanical stenography, transcript
15 produced by computer-aided transcription.
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PROCEEDINGS

THE COURT: Good afternoon, everybody. Please be seated.

MR. WILLIAMS: The judge would like the camera viewed in closer if possible. We're not seeing the defendant's face very clearly. Is it possible to bring the view in closer?

A PRISON GUARD: Well, all we can do is move it closer. We don't have a -- one that we can --

MR. WILLIAMS: Zoom in?

Okay. If it's -- is it possible to maybe bring the view in? Because we would like to get a better, closer view.

THE COURT: I can't make out his face, and I need to be able to see his face.

MR. WILLIAMS: Yes, ma'am.

(The camera is being adjusted by prison guards)

THE COURT: Okay. That's a little better. I can see him. Okay.

All right. Mariano Juarez-Rosales versus Nathaniel Quarterman. Who's here for the petitioner, please?

MS. SWARNS: Good afternoon, your Honor. I am Christina Swarns on behalf of the NAACP --

THE COURT: Are you addressing the Court?

MS. SWARNS: Yes.

THE COURT: Stand up.

01 : 45 1 MS. SWARNS: I apologize, your Honor.

2 Good afternoon. My name is Christina Swarns.

3 I'm from the NAACP Legal Defense Fund; and I, along with David
4 Dow and Joshua Gray, are here on behalf of the petitioner,
5 Mariano Rosales.

6 THE COURT: Who's is sitting next to you?

7 MS. SWARNS: This is Mary -- I'm blank -- Mary Hunter.

8 THE COURT: Also counsel, as well?

9 MS. SWARNS: She's assisting us.

01 : 45 10 THE COURT: Okay. Also counsel, as well?

11 MS. HUNTER: Yes, your Honor.

12 THE COURT: Okay. I wanted to be sure.

13 And for the respondent, please?

14 MS. MIRANDA: Tina Miranda and Tom Jones.

01 : 46 15 THE COURT: All right. For the respondent.

16 You-all heard me complain a moment ago about
17 the -- I just wanted to make sure that I was able to see the
18 petitioner's face clearly.

19 Ms. Swarns, Mr. Dow, can you-all confirm for me
01 : 46 20 that, in fact, that is Mr. Rosales who is appearing before us
21 today by video teleconference?

22 MS. SWARNS: It is, your Honor.

23 THE COURT: All right. Mr. Rosales, can you hear me
24 clearly?

01 : 46 25 MR. ROSALES: Yes, ma'am.

01:46 1 THE COURT: All right.

2 MR. ROSALES: Yes, ma'am.

3 THE COURT: All right. If you have any difficulty
4 hearing anything that anybody is saying during the course of
5 these proceedings, could you just go ahead and interrupt and
6 interject and tell us that you can't hear us, please?

7 MR. ROSALES: Yes, your Honor. Yes.

8 THE COURT: All right. I just wanted to make sure.
9 Don't wait. Feel free to cut in if at any point in time the
01:46 10 sound gets bad or if someone doesn't raise their voice high
11 enough for you to be able to hear.

12 MR. ROSALES: I will. All right.

13 THE COURT: All right. We are here today on a hearing
14 that the Court authorized following briefing. And the single
01:47 15 issue that the Court has before it today has to do with the
16 petitioner's question of whether the prosecution used its
17 peremptory challenges in a racially discriminatory manner.

18 The petitioner requested an opportunity to do
19 some written discovery, and you guys got a chance to do that.
01:47 20 Is that right, Ms. Swarns?

21 MS. SWARNS: Yes, your Honor.

22 THE COURT: Did you get all the written discovery that
23 the Court authorized previously?

24 MS. SWARNS: Yes, your Honor.

01:47 25 THE COURT: Okay. And then, subsequent to that time,

01 : 47 1 requested that they have an opportunity to -- the Court made
2 findings that -- based on the subsequent briefing, that it
3 would take additional evidence with respect to those issues.
4 And that is the purpose of the hearing that we're on here
01 : 48 5 today.

6 I have a witness list from the petitioner that
7 has just three witnesses on it. Is that right?

8 MS. SWARNS: Yes, your Honor.

9 THE COURT: And, then, do you guys have a -- an
01 : 48 10 exhibit list for me as, well as?

11 MS. SWARNS: Your Honor, we have, for the convenience
12 of the Court and counsel, bound the hard copies of the
13 documents that we provided to your Honor by DVD. And I can run
14 through what we have organized for you.

01 : 48 15 THE COURT: Perfect. I'll take them right now.

16 MS. SWARNS: Okay. We have what is characterized as
17 Joint Exhibits 1 through 4.

18 THE COURT: "Joint exhibits" meaning that they're
19 going to be exhibits for both the petitioner and respondent?

01 : 49 20 MS. MIRANDA: Yes, your Honor.

21 THE COURT: You guys just came together with a set of
22 exhibits?

23 MS. SWARNS: Yes. Yes, your Honor. And I'll just
24 briefly summarize for your convenience what they are.

01 : 49 25 THE COURT: Do you have an exhibit list for me?

01 : 49 1 MS. SWARNS: We do not have a printed copy of the
2 exhibit list, I'm sorry to say; but I can summarize for the
3 Court what each one is.

4 (Sotto voce discussion between Court and staff)

01 : 49 5 THE COURT: Okay. You'll need to go ahead and fill
6 out an exhibit list for me.

7 MS. SWARNS: Okay.

8 THE COURT: I need something for the record. I
9 actually need an actual exhibit list. So, let's just wait.

01 : 49 10 MS. SWARNS: Okay.

11 THE COURT: Why do I have the first one Joint Exhibit
12 2? Are they out of order?

13 MS. SWARNS: It's just out of order. The large ones
14 are 1A and 1B.

01 : 50 15 THE COURT: Oh, I got it. So, how many exhibits do I
16 have, then?

17 MS. SWARNS: A total of five; although, it's four --
18 there's 1A and 1B.

19 THE COURT: 1A.

01 : 50 20 MS. SWARNS: The binders are 1A and 1B.

21 THE COURT: 1B.

22 And 2 is just the small affidavit binder?

23 MS. SWARNS: Yes, your Honor.

24 THE COURT: And 3 is the depositions, and 4 is --

01 : 50 25 MS. SWARNS: The Harris County Batson hearing.

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01:51

1 THE COURT: Oh, the hearings that were in Harris
2 County.

3 MS. SWARNS: Yes, your Honor.

4 THE COURT: All right. And, then, there is no --
5 since these are joint exhibits, there's no objection to any of
6 these exhibits. Is that correct?

7 MS. MIRANDA: No, your Honor. Right.

8 THE COURT: All right. So, then, the Joint Exhibits
9 1A, 1B, 2, 3, and 4 are admitted. I'll mark them on the
10 exhibit list as soon as we get the exhibit list, and mark them
11 all as admitted.

12 And there is -- there's no separate set; you guys
13 just decided to combine the whole set of exhibits. Is that
14 correct?

15 MS. MIRANDA: Yes, your Honor.

16 THE COURT: All right. All right. Well, while --
17 she'll get that exhibit list for us, and she'll make the
18 exhibit list for us and mark those all as admitted exhibits.

19 Are we ready to proceed, then?

20 MS. SWARNS: I just want to address one -- or two
21 other minor housekeeping matters.

22 THE COURT: All right. Yes, please.

23 MS. SWARNS: Our witnesses are three, I think, as
24 between both parties. We have the trial prosecutors, Keno
25 Henderson and Norma Davenport.

01:51 1 THE COURT: Right.

2 MS. SWARNS: And for the petitioner, we are calling
3 attorney Craig Washington as a layperson. I would just state
4 for the record he has no crimen falsi and there's no
5 convictions that qualify his impeachment under the rules.

6 THE COURT: Okay.

7 MS. SWARNS: Based on my conversation with
8 Ms. Miranda, it is our plan to have the affidavits that
9 Mr. Henderson and Ms. Davenport have previously submitted,
01:51 10 which are included in Exhibit 1A --

11 THE COURT: Right.

12 MS. SWARNS: -- to serve as their direct testimony.
13 And we will begin actual questioning with their
14 cross-examination.

01:52 15 MS. MIRANDA: And, then, your Honor, we would reserve
16 the right to redirect once they've had the opportunity to
17 cross-examine those affidavits.

18 THE COURT: Oh, okay. That's fine.

19 MS. MIRANDA: That was our understanding, that the
01:52 20 hearing was to enable them the opportunity to cross-examine the
21 testimony that was asserted in their affidavits.

22 THE COURT: It doesn't matter to me, actually. I
23 mean, if that's the case, then I just need to reread the
24 affidavits myself. If you guys told me that ahead of time, I
01:52 25 would have read them. But, I mean, I read them at one point in

01:52

1 time a little while back.

2 MS. SWARNS: They're actually in 1A, the front of 1A.

3 THE COURT: What affidavits are these?

4 MS. SWARNS: Those are addressing the race of some of
01:52 5 the jurors.

6 THE COURT: Okay.

7 THE COURT REPORTER: Can you-all speak up for me?

8 MS. SWARNS: I'm sorry.

9 Yes, the prosecutors' affidavits are in Tab 1 and
01:52 10 Tab 2 of Exhibit -- Joint Exhibit 1A.

11 THE COURT: Okay. Yeah. I already have these
12 affidavits. I read these in the context of the -- yeah, I read
13 these both in the context of the previous briefing that we had
14 on this. Right. Okay.

01:53 15 MS. SWARNS: Just so your Honor knows, our plan is to
16 begin with Ms. Davenport. My colleague, Mr. Gray, will
17 cross-examine her; and then we will proceed with Mr. Henderson,
18 and I will cross-examine him. And I will present the testimony
19 of Mr. Washington.

01:53 20 THE COURT: Okay. Hold on a second. I just want to
21 make sure I remember all of this. Just give me a second just
22 to refresh my recollection. I remember reading all this; but
23 since you're going to start with cross, let me just go over it
24 again really quickly.

01:53 25 MS. SWARNS: Sure.

01 : 53 1 THE COURT: All right. They both -- each individual
2 person. Okay.

3 *(Sotto voce discussion between Court and staff)*

4 THE COURT: All right. Who will be starting?
01 : 55 5 Mr. Gray?

6 MR. GRAY: Your Honor, may we have the Court's
7 permission to have bottles of water at the table for the folks
8 who are asking the questions?

9 THE COURT: Absolutely. Did you guys bring some?

01 : 55 10 MR. GRAY: Yes. I just wanted to make sure it's okay.

11 THE COURT: Unfortunately, you know, the government is
12 cheap. We don't have any water for you guys anymore.

13 MR. GRAY: Our resourceful paralegal found some in the
14 building.

01 : 55 15 THE COURT: Okay. Perfect.

16 Okay. What are we going to start with?

17 MR. GRAY: We call Ms. Davenport, Norma Davenport.

18 THE COURT: Is she out in the hallway?

19 Okay. I just didn't know.

01 : 56 20 MR. GRAY: Your Honor, is it okay if I question
21 Ms. Davenport sitting at this table?

22 THE COURT: Absolutely. Except that I want to make
23 sure -- where is the witness going to be? Is the witness --
24 how did we set it up? We set it up with the witness to be
01 : 56 25 there?

01 : 56 1 THE CASE MANAGER: Yes, Judge. Because I was -- I was
2 still having difficulty as to where to put them.

3 THE COURT: Well, the only --

4 THE CASE MANAGER: She won't be seen?

01 : 56 5 THE COURT: Yeah. Here's my only objection. This is
6 just me personally. I mean, maybe you guys don't care; but I
7 would really like Mr. Rosales to be able to see the witnesses,
8 because right now --

9 Mr. Rosales, the only person you can see is me,
01 : 56 10 correct?

11 MR. ROSALES: Yes, your Honor.

12 THE COURT: Okay.

13 MR. ROSALES: Yes, your Honor.

14 THE COURT: Can we put the witness here? And I'll
01 : 56 15 just move back. I mean, I don't think it matters to you guys;
16 but, I mean, I think Mr. Rosales should be able to see the
17 witnesses.

18 *(Discussion off the record)*

19 THE COURT: Okay. What should we put down here to
01 : 57 20 make it easier now so we don't have to keep climbing up? What
21 should the witness be able to have in front of her?

22 MR. GRAY: The most important ones will be --

23 THE COURT: 1A?

24 MR. GRAY: 1A for sure.

01 : 57 25 THE COURT: Okay. That one on the bottom.

01:57 1 MR. GRAY: And 3. But please have the others in
2 reach, as well.

3 THE COURT: All right.

4 MS. MIRANDA: Is that her deposition? Is that 3?

01:57 5 MR. GRAY: Yes, ma'am.

6 THE COURT: Okay. So, now -- so, Mr. Rosales, can you
7 see the witness now?

8 MR. ROSALES: Yes, ma'am. Yes, your Honor.

9 THE COURT: All right. And your lawyer is off to my
01:58 10 left and -- so you won't be able to see your lawyer, but I
11 think that it's really mostly important for you to be able to
12 see the witness during this part of the proceedings. All
13 right?

14 MR. ROSALES: Yes, ma'am. Yes, ma'am. Yes, your
01:58 15 Honor.

16 THE COURT: Would you stand?

17 THE CASE MANAGER: Raise your right hand, please.

18 Do you solemnly swear the testimony you give in
19 the case now before the Court will be the truth, the whole
01:58 20 truth, and nothing but the truth, so help you God?

21 THE WITNESS: I do.

22 THE CASE MANAGER: Take a seat.

23 MR. GRAY: Ms. Reporter, are you ready?

24 **NORMA DAVENPORT, DULY SWORN, TESTIFIED:**

25 **CROSS-EXAMINATION**

Gray Cross of Davenport

1 BY MR. GRAY:

2 Q. Ms. Davenport --

3 A. Yes, sir.

4 Q. -- have you read the pretrial proposed findings of fact
01:59 5 submitted by the State in this matter?

6 THE COURT: Ask the witness to state her name for the
7 record, please.

8 BY MR. GRAY:

9 Q. Please state your name for the record.

01:59 10 A. My name is Norma Davenport.

11 MR. GRAY: Was the witness sworn in, your Honor?

12 THE WITNESS: Yes.

13 BY MR. GRAY:

14 Q. Have you read the pretrial proposed findings of fact
01:59 15 submitted by the State in this matter?

16 A. No, I have not seen them.

17 Q. Have you read the pretrial proposed findings of fact
18 submitted by Mr. Rosales in this matter?

19 A. I have not seen them.

01:59 20 Q. Have you read the transcript of Mr. Henderson's deposition?

21 A. I have not.

22 Q. Have you reviewed any other pleadings in this case?

23 A. I have not.

24 Q. Mrs. Davenport, when did you begin working at the Harris
01:59 25 County District Attorney's Office?

Gray Cross of Davenport

01 : 59

1 A. In November of 1979.

2 Q. And when did you leave that office?

3 A. In July of 1986.

4 Q. Briefly, could you recap the positions that you held during
01 : 59 5 your tenure at the office?

6 A. I started out as the Number 3 prosecutor in the misdemeanor
7 court. I went through all three of the positions in
8 misdemeanor. I went through all three positions in the court
9 in felony division. At one time I was deputy chief of
02 : 00 10 misdemeanor.

11 Q. Is that all?

12 A. That's it.

13 Q. Okay. Ms. Davenport, what did you look for when selecting
14 jurors?

02 : 00 15 A. I looked for people who I thought would understand what we
16 were trying to prove, who would follow the law, and whom I felt
17 comfortable that they would do so.

18 Q. Could you please turn to Exhibit 3, Tab 1, which contains a
19 copy of your deposition transcript?

02 : 00 20 A. (Complies).

21 THE COURT: It's the little one, over there to the
22 right.

23 THE WITNESS: Oh, I'm sorry.

24 Okay.

02 : 01 25 MS. MIRANDA: Just for the record, to facilitate,

Gray Cross of Davenport

02:01 1 there's no exhibit numbers on those. So, if you refer to them
2 by number --

3 THE COURT: Yes, there are. They're on the side.

4 MS. MIRANDA: Oh, I'm sorry. I apologize. I didn't
02:01 5 see them from the side.

6 BY MR. GRAY:

7 Q. Ms. Davenport, at Page 63, Line 6, you say you're looking
8 for jurors with a stake in the community, probably a steady
9 job, maybe a family?

02:01 10 A. Yes.

11 Q. Is that accurate?

12 A. That's accurate, too.

13 Q. On Page 82, you say -- on Line 24, you say that you would
14 like jurors who can identify with you, believe you, or trust
02:02 15 you or feel like you were somebody that they could talk to if
16 the circumstances were different. Do you agree with that
17 statement?

18 A. I do.

19 Q. On Page 37, please, Line 13, you testified that, "whether
02:02 20 they agreed with capital punishment, whether they thought it
21 was necessary, or whether they disagreed with it but still
22 thought it was necessary."

23 Do you still agree with that statement?

24 That's Page 37, Line 13.

02:02 25 A. Well, yes. I was looking for their feelings, what they

Gray Cross of Davenport

02:02 1 thought about it, whether they thought it was necessary,
2 whether they disagreed with it, I just -- yes, I agree with the
3 statement.

02:02 4 Q. Was it important to you to have a juror who agreed with
5 capital punishment?

6 A. Yes. They're not qualified to be on a capital jury if they
7 don't.

8 Q. Was it important to you to have a juror who felt that
9 capital punishment was necessary?

02:03 10 A. Yes. Pretty much.

11 Q. Was someone who felt that capital punishment was necessary
12 more important than having someone who actually believed in
13 capital punishment?

14 A. I don't know that I particularly see the difference.

02:03 15 Q. Okay. What kinds of people were you trying to exclude from
16 serving as jurors?

17 A. Well, those people who could not follow the law, who gave
18 evasive answers that I wasn't comfortable with, those people
19 who -- well, those who were all struck for cause because of
02:03 20 biases.

21 Q. Anything else?

22 A. Well, I'm sure there are; but I don't know that I can I
23 think of them right now but --

24 Q. Could you please turn to Page 63, Lines 10 through 12, of
02:04 25 your deposition?

Gray Cross of Davenport

02:04 1 A. Ten through twelve?

2 Q. Yes, ma'am.

3 A. Okay.

4 Q. You said that you were cautious about people who you
02:04 5 perceived to be alcoholics or who drank too much or engaged in
6 occupations like prostitution. Is that an accurate statement?

7 A. That's an accurate statement.

8 Q. Could you please turn to -- same page, Lines 13 through 15.

9 You testified, "I did not think preachers made
02:04 10 very good State jurors because I thought they were too
11 kindhearted and forgiving."

12 Is that an accurate statement of your views?

13 A. Yes.

14 Q. And on Line 17 through 19, you said, "And I suspected that
02:04 15 painters didn't make very good jurors because I thought they
16 drank frequently."

17 Is that an accurate statement of your views?

18 A. Yes, that's something that we -- or that I encountered
19 occasionally in picking juries; and, yes, I don't think
02:05 20 painters made good jurors.

21 Q. Okay. And on Lines 10 through 12, you said, "If I had
22 enough people from whom I could choose, I wouldn't put teachers
23 on my juries either."

24 That's Page 69, Lines 10 through 12. Is that an
02:05 25 accurate statement of your views?

Gray Cross of Davenport

02:05 1 A. Yes. Same reason, basically.

2 Q. Okay. Do you have a view as to what age group -- whether
3 the age group that the person taught made a difference as to
4 whether a teacher was likely to be a good juror?

02:05 5 A. No. I don't think so.

6 Q. Were there other suspect professions, in your mind, other
7 professions that raised concerns for you?

8 A. I think engineers are a little picky.

9 Q. What did you mean when you said -- sorry. Excuse me. Do
02:05 10 you have another?

11 A. No.

12 Q. What did you mean when you said, "occupations like
13 prostitution"? What did you have in mind when you made that
14 assertion?

02:06 15 A. Well, I think you had asked me what types of people I
16 didn't want on a jury --

17 Q. Correct.

18 A. -- what certain occupations. And I said, "An occupation
19 like prostitution."

02:06 20 Wasn't that the answer?

21 Q. Correct.

22 Were you concerned that people were engaged in
23 criminal activities?

24 A. Well, I don't know that prostitution necessarily means that
02:06 25 somebody is such a criminal that you're not going -- that

Gray Cross of Davenport

02:06 1 you're going to know what their occupation is. But if I were
2 to know, I wouldn't want to put a prostitute on a jury.

3 Q. Okay. Do you consider lawyers to be favorable jurors?

4 A. Sometimes.

02:06 5 Q. Are federal postal workers favorable jurors?

6 A. Sometimes.

7 Q. Under what circumstances would a lawyer be a favorable
8 juror?

9 A. In most criminal cases, I think they are. As a civil
02:07 10 lawyer, I'm not sure I would put them on a jury -- or want them
11 on a jury.

12 Q. And under what circumstances would a federal postal worker
13 be a favorable juror?

14 A. It just depends on their personality, on their
02:07 15 individuality.

16 Q. Are there circumstances in which you wouldn't want a
17 federal postal worker as a juror?

18 A. I think I've had postal workers on juries before, who hung
19 up juries. And that's why I'm not real comfortable with them.

02:07 20 Q. Ms. Davenport, were you able to judge jurors that you might
21 not want based on their appearance, things you could tell about
22 a juror based on their appearance, that would send you a signal
23 that you did not want them?

24 A. Sometimes, yes.

02:07 25 Q. Were there some people who it was so clear to you that you

Gray Cross of Davenport

02:07 1 would not connect with them that you could strike them even
2 without asking questions?

3 A. I don't know that I did that in this case; but, yeah, I
4 think that's -- that's possible.

02:08 5 Q. Okay. If you could please turn to Page 57, Line 15, of the
6 deposition transcript.

7 A. Line 15?

8 Q. Yes, ma'am.

9 A. Okay.

02:08 10 Q. You say, "It's got to be someone you feel like you can
11 interact with. I don't like jurors -- men, young men in
12 particular -- who come in and slouch down in the pew. I know
13 it's not comfortable; but they slouch down, and they have this
14 air of, 'I'm wasting my time here.' I can strike them without
02:08 15 asking a question."

16 A. I didn't find the right page, but that sounds right.

17 Q. Page 57, Line 15.

18 A. Fifty-seven?

19 Okay. I see it.

02:08 20 Q. Do you agree with that statement?

21 A. I do.

22 Q. Okay. Other than young men who slouch down in the pew,
23 were there other types of jurors who you knew you weren't going
24 to be able to connect with?

02:09 25 A. There are some times when a juror -- potential juror takes

Gray Cross of Davenport

02:09 1 the stand or is in a roomful of veniremen, you can tell by the
2 way they're looking at you, if they're sending friendly vibes
3 or critical vibes or crossed arms or won't meet your eye
4 contact.

02:09 5 Q. Okay. Did you look for clues that a potential juror might
6 be an alcoholic?

7 A. I don't think I did in this case, no.

8 Q. Did you look for clues that a potential juror might be a
9 prostitute?

02:09 10 A. No.

11 Q. Would the neighborhood that the person lived in send you a
12 clue, a neighborhood with a certain kind of reputation?

13 A. No.

14 And you asked me some questions about why I made
02:09 15 notations about neighborhoods.

16 Q. Yes, ma'am.

17 A. On every one of those first forms, there was a place for
18 them to either put their address or the location in town in
19 which they lived. And if they didn't fill that out, I noticed
02:10 20 that I wrote in there a lot where -- what part of town it was.

21 And there are apparently two forms that were
22 used. One of them asked for the address; one of them asked for
23 the part of town. I don't know why they're different.

24 Q. Okay. Is it your understanding that there were juror forms
02:10 25 that did not contain an address? Is that --

Gray Cross of Davenport

02:10 1 A. Yes. One of the forms asked for the address, right under
2 the name. Some of the other forms, instead of asking for the
3 address, asked for the part of town they were from.

02:10 4 Q. And is it your understanding that some of the potential
5 jurors in this case did not fill their addresses out on the
6 juror card?

7 A. That's right. That's on the long form.

8 Q. On the long form or the short form?

9 A. The long form.

02:11 10 Q. How many capital cases have you prosecuted?

11 A. Two.

12 Q. And what was the other capital case that you prosecuted?

13 A. I told you on the deposition, and I'm not thinking of his
14 name right now.

02:11 15 Q. Would it refresh your recollection, Mr. Tompkins' trial?

16 A. Yes.

17 Q. Do you recall the year of the Tompkins trial?

18 A. No. It was before this one. So, it was '83, maybe, '82.
19 I don't know.

02:11 20 Q. Okay. What was your position during the Tompkins trial?

21 A. I was sitting second chair.

22 Q. And who was first chair?

23 A. Tommy Royce.

24 Q. What do you recall about the Tompkins trial?

02:11 25 A. You mean the fact situation?

Gray Cross of Davenport

02:11

1 Q. Yes, ma'am.

02:12

2 A. I remember that he was a young man who had been in prison
3 in Virginia before. He followed someone -- a woman home from
4 the Medical Center. I can't remember if she was a pharmacist
5 or what her position there was; but he followed her home, out
6 toward Missouri City, and ran into the back of her car. And
7 when she got out to check, he abducted her and took her out
8 south of the Astrodome and tied her to a tree and raped her and
9 gagged her and killed her, used her ATM card.

02:12

10 Q. Was Mr. Tompkins convicted?

11 A. Yes.

12 Q. Was he sentenced?

13 A. Yes.

14 Q. What sentence did he receive?

02:12 15 A. He received the death penalty.

16 Q. Do you know whether Mr. Tompkins was executed?

17 A. No, he was not.

18 Q. Why wasn't he executed?

19 A. His sentence was commuted to life because of an expert
02:12 20 witness who testified on behalf of the State, who gave false --
21 well, she didn't give false testimony except as to her
22 credentials. She had been in the position of a psychologist, I
23 believe, at the penitentiary where he had been incarcerated and
24 had treated him there.

02:13 25 And she held herself out to have -- her college

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02:13 1 credentials were in psychiatry or psychology. I've forgotten.
2 And she made an expert -- a wonderful expert witness; but,
3 unfortunately, she only had an art degree. I don't know where
4 she learned her trade, but she was not -- she didn't have the
02:13 5 qualifications she held herself out to have.

6 Q. As a result of that, the sentence was reduced?

7 A. As far as I know, that's the reason, yes.

8 Q. Ms. Davenport, how many times have you been required to
9 testify at a Batson hearing prior to today?

02:13 10 A. I think I testified once.

11 Q. Do you recall the circumstances under which that happened?

12 A. No, sir. I told you at the deposition I don't even
13 remember which case it was.

14 Q. I think at the deposition I showed you a copy of the Batson
02:14 15 hearing transcript from the Tompkins case.

16 A. Okay. If that's the one it was, then that's --

17 Q. Okay. Are you familiar with that transcript?

18 A. Have I read it? No.

19 Q. Have you read it?

02:14 20 A. No, have not.

21 Q. Okay. You left the deposition with a copy of that
22 transcript, to my recollection. Is that correct?

23 A. No, I did not.

24 Q. You did not take a copy of the transcript?

02:14 25 A. No, I didn't -- I didn't have a copy of it.

Gray Cross of Davenport

02:14 1 Q. Okay. Do you have any recollection as to whether any
2 African-American jurors sat on the jury in Mr. Tompkins' trial?

3 A. I have no recollection.

4 Q. Okay. Did you have any discussions prior to this hearing,
02:15 5 with anyone about the Tompkins Batson hearing?

6 A. (Shaking head).

7 Q. Did you discuss that hearing with anyone?

8 A. No, I did not.

9 Q. If you could please turn to Exhibit 4, Tab 2, Page 161.

02:15 10 A. Tab 2, 161?

11 Q. Yes, ma'am.

12 Okay. I'd like to focus on the question that
13 begins at the bottom of -- or Line 20 of that page. This is
14 counsel for Mr. Tompkins asking Mr. Royce, "While you were an
02:15 15 assistant district attorney, did you ever have conversations
16 with other assistant district attorneys or been privy to
17 conversations with other assistant district attorneys,
18 concerning the undesirability of minorities on juries, where
19 you had a choice?"

02:16 20 Mr. Royce responded, "I guess, you know,
21 everybody talks about those things. I don't think there's any
22 question that you don't."

23 Do you recall conversations with Mr. Royce
24 concerning the undesirability of minorities on juries?

02:16 25 A. I do not.

Gray Cross of Davenport

02:16 1 MS. MIRANDA: Your Honor, if I may at this point, I'm
2 not objecting to the admission of this exhibit, because she
3 testified in here. And to the extent that they want to use it
4 to cross-examine her regarding what's relevant in this case, we
02:16 5 have no objection but to the extent that they're admitting it
6 for other people's testimony in here when we don't have the
7 opportunity to cross-examine Mr. Royce.

02:16 8 THE COURT: Well, it was just a question about whether
9 or not she recalls any conversation like that. I don't think
10 that that's an objectionable question at this point.

11 MS. MIRANDA: Thank you, your Honor.

12 THE COURT: But feel free to, you know, let me know if
13 you think that there's another problem; but I don't think that
14 there's any objectionable question there.

02:16 15 Did you have an opportunity to answer that
16 question?

17 THE WITNESS: I did, your Honor.

18 THE COURT: Okay. Could you give your answer again,
19 please? Did you say you did or you did not?

02:17 20 THE WITNESS: I did not.

21 BY MR. GRAY:

22 Q. Ms. Davenport, do you agree with Mr. Royce that there is
23 not any question that -- question that assistant district
24 attorneys discuss, quote, the undesirability of minorities on
02:17 25 juries?

Gray Cross of Davenport

02:17 1 A. Well, I'm sure some of them do. I don't remember ever
2 having those conversations, but apparently he does.

3 Q. Mr. Royce was your supervisor at some point?

4 A. He was the chief of that court, yes.

02:17 5 Q. Was he a respected prosecutor?

6 A. Yes, he was.

7 Q. Do you have any reason to doubt the credibility of
8 Mr. Royce's statement?

9 A. No, sir.

02:17 10 Q. Okay. If you could, please turn to Page 162.

11 THE COURT: In that same deposition?

12 MR. GRAY: Yes, ma'am. Yes, your Honor.

13 BY MR. GRAY:

14 Q. Lines 11 through 16, Mr. Royce was asked, "Do you recall
02:17 15 being privy to a conversation or at least the general feeling
16 that Blacks were more inclined -- Blacks or minorities were
17 more inclined to be lenient to defendants?"

18 Answer by Mr. Royce, "I think that's a
19 possibility and something you have to look at, yes."

02:18 20 Ms. Davenport, did you have conversations with
21 Mr. Royce concerning a general feeling that Blacks or
22 minorities were inclined to be more lenient to defendants?

23 A. I have no idea if I did or not.

24 Q. Okay. Do you agree with him that if Blacks or minorities
02:18 25 would be more inclined to be lenient with defendants is

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02:18

1 something you have to look at?

2 A. I would agree with him if -- if the defendant is someone
3 with whom I think that they might connect with, yes.

4 Q. So, would -- when you were selecting jurors, you would
5 consider the possibility that a juror might identify with the
6 accused person?

7 A. Yes. And sometimes it didn't have anything to do with
8 race.

9 MR. ROSALES: Your Honor? Your Honor?

02:18 10 THE COURT: You can't hear?

11 MR. ROSALES: I didn't hear. Yes, I heard; but I
12 couldn't understand the previous question that they asked her,
13 about connecting with your --

14 THE COURT: Okay. I will ask -- I will ask Mr. Gray,
02:19 15 your lawyer, if he'll keep his voice up.

16 I can hear you fine but -- is that the mic down
17 there?

18 MR. GRAY: We can move this over, your Honor.

19 MR. ROSALES: I didn't hear her. I didn't hear the
02:19 20 answer that, your Honor. I didn't hear the answer that she
21 gave.

22 THE COURT: Okay. All right. We'll do that last
23 question and answer again for you a little bit louder so that
24 you can hear.

02:19 25 THE CASE MANAGER: This is the only mic.

Gray Cross of Davenport

02:19 1 THE COURT: Oh, this is the only mic in the room?

2 (*Sotto voce discussion between Court and staff*)

3 MR. GRAY: I will try to speak up, your Honor.

4 THE COURT: Okay. Mr. Gray, could you speak up for
02:19 5 us?

6 And I'm sorry, Ms. Davenport. Could you speak
7 up, too?

8 THE WITNESS: Certainly.

9 THE COURT: I think that the -- can you go back to the
02:19 10 last question that you had just started asking, which I think
11 was about Line 11 or so.

12 MR. GRAY: Line 11? Okay. Okay.

13 THE COURT: Keep your voice up a little bit. I can
14 hear you fine, but I wasn't thinking in terms of it not
02:20 15 necessarily carrying.

16 BY MR. GRAY:

17 Q. We're at Page 162, Line 11; and I'm reading from questions
18 that were asked of Mr. Royce, Ms. Davenport's supervisor and
19 co-counsel in this particular trial, by an attorney for the
02:20 20 defendant in that case.

21 "Do you recall being privy to a conversation or
22 at least a general feeling being that Blacks were more
23 inclined -- Blacks or minorities were more inclined to be
24 lenient to defendants?"

02:20 25 And Mr. Royce answers, "I think that's a

Gray Cross of Davenport

02:20

1 possibility and something you have to look at, yes."

2

I'll repeat the question, Ms. Davenport. Did you
3 ever have conversations --

4

A. I have no idea if I had a conversation with Mr. Royce about
02:20 5 that.

6

Q. Okay. Do you --

7

A. But, yes, I am familiar with that feeling -- with that --

8

Q. Did you have conversations with other prosecutors in the
9 office, along those lines?

02:20 10

A. I don't know. I don't remember any.

11

Q. You don't remember any specific conversations?

12

A. No.

13

Q. But it wouldn't surprise you that conversations like that
14 took place in the office --

02:21 15

A. No, sir.

16

Q. -- in the early Eighties?

17

A. No, sir.

18

Q. Do you agree with Mr. Royce that Blacks and minorities
19 being more inclined to be lenient to defendants is something
02:21 20 that you have to look at, Ms. Davenport?

21

A. Yes, I agree with you --

22

Q. Could you explain the basis of your agreement?

23

A. Well, if you have two people who are from the same
24 background and have the same outlook on life, if they see
02:21 25 someone they identify with, then you may -- you'd probably have

Gray Cross of Davenport

02:21 1 a hurdle, to get over that personal identification with them.

2 Q. When you were interviewing potential jurors, how did you
3 take this concern into account?

4 A. Well, we didn't have very many Hispanic male jurors, as I
02:21 5 recall. And several of them were struck for cause. So, I
6 didn't have to take it into account.

7 There was one Hispanic male juror, whose name was
8 Mr. Rodriguez, who the defense lawyer struck. So, I didn't
9 have to take that one into account.

02:22 10 We had at least one Hispanic male juror who was
11 selected to be on the jury. And I don't remember how I
12 evaluated him, but I thought he could be fair.

13 Q. What kinds of questions did you ask to discern whether a
14 juror might identify with the defendant?

02:22 15 A. I don't know that I asked any.

16 Q. Were there groups that -- other than Hispanics -- that you
17 were concerned about that might identify with a defendant?

18 A. With this defendant --

19 Q. Yes.

02:22 20 A. -- or any defendant?

21 Q. For instance, would you be concerned that a male potential
22 juror might identify with a male defendant, particularly in a
23 crime of passion?

24 A. Not particularly, no.

02:22 25 Q. What would be your reason for thinking that a Hispanic

Gray Cross of Davenport

02:23 1 potential juror might identify with a defendant, but a male
2 potential juror was not particularly likely to identify with
3 the defendant?

4 A. Well, not unless the male was Hispanic, also.

02:23 5 Q. So, you think it's more likely that the identification
6 would be a basis of ethnic background rather than gender?

7 A. Could be, yes.

8 Q. Okay. Who is Bob Moen?

9 A. He is a man who used to be a prosecutor. I don't know what
02:23 10 he is now.

11 Q. Was Mr. Moen a respected prosecutor?

12 A. As far as I know, he was.

13 Q. Could you please turn to Page 18 of the transcript you have
14 in front of you, ma'am?

02:23 15 A. Under Tab 2?

16 Q. Yep. If you'd please look at Line 20, Mr. Moen testifies,
17 "Because of the poor relationship historically the police have
18 had with minority members of our community, as a general rule,
19 be aware of selecting minorities, depending on the type of
02:24 20 case, because they're not likely to feel ingratiated toward you
21 as a prosecutor or perhaps your police officers who will
22 testify as witnesses, because historically the problems that
23 police officers have had and because essentially so many, from
24 a personal standpoint, of the people we prosecuted as
02:24 25 prosecutors are members of the Black community."

Gray Cross of Davenport

02:24 1 Did you read that Ms. Davenport?

2 A. Yes, I read it.

3 Q. Do you agree with Mr. Moen's statement that assistant
4 district attorneys had, as a general rule, to be aware of
5 selecting minorities?

6 A. It wasn't as it applied to me. I wasn't aware of that type
7 of feeling, no. And I didn't have that type of problem.

8 Q. Did you ever hear other prosecutors express the view that
9 Mr. Moen recognizes in that passage?

02:25 10 A. No. But I wasn't at the same level as Mr. Moen, either.
11 He was several years ahead of me. And if he and the group that
12 he went in had that problem, it wasn't my experience.

13 Q. Okay. Was he ever a supervisor of yours?

14 A. No.

02:25 15 Q. Okay. If you could please turn to Page 132 of your
16 deposition.

17 A. Is that Number 3? Tab 1?

18 THE COURT: Tab 2.

19 THE WITNESS: One hundred thirty-three?

02:26 20 THE COURT: He said 132, I think.

21 MR. GRAY: Yes. Excuse me. Did I say 132?

22 THE COURT: I think so. That's what I turned to.

23 MR. GRAY: Okay. Yes. Correct.

24 BY MR. GRAY:

02:26 25 Q. Line 10, you testified that, "Blacks tend to be more

Gray Cross of Davenport

02:26 1 sympathetic towards Blacks just as any other group tends to be
2 more sympathetic to people in that group. It doesn't matter
3 what kind of group it is."

02:26 4 THE COURT: Wait a minute. What page are you on
5 again?

6 MR. GRAY: Your Honor, I'm on Page -- Ms. Davenport's
7 deposition transcript, Page 132, Line 10.

8 THE COURT: Oh, you switched exhibits.

9 MR. GRAY: Yes, ma'am.

02:26 10 THE COURT: I'm sorry.

11 MR. GRAY: I apologize for not making that clear.

12 BY MR. GRAY:

13 Q. Ms. Davenport, is that clear to you, I'm now in Exhibit 3?

14 A. This?

02:26 15 THE COURT: Three.

16 THE WITNESS: Tab 1?

17 THE COURT: Tab 1? Oh, Tab 1. I'm sorry. I'm all
18 messed up.

19 MR. GRAY: This is her deposition transcript.

02:27 20 BY MR. GRAY:

21 Q. So, you shared some of Mr. Moen's concern that group
22 sympathy could affect a juror's decision maybe?

23 A. That was my opinion. I don't know if it's his opinion.

24 Q. Ms. Davenport, prior to the Batson decision, were you aware
25 of any law that prevented you from striking an individual juror

Gray Cross of Davenport

02:27 1 on the basis of race?

2 A. Not that I recall.

3 Q. Okay. Following your testimony at the Tompkins hearing,
4 are you aware of any appellate litigation that followed?

02:27 5 A. I wasn't aware of it. I wasn't in the loop; so, I don't
6 know.

7 Q. Are you familiar with a decision of the Court of Criminal
8 Appeals?

9 A. No.

02:28 10 Q. You weren't curious as to what happened after your
11 testimony in Tompkins' Batson hearing?

12 A. Sure, I was curious; but I still didn't know what happened.

13 Q. Okay.

14 A. And by that time, I was probably gone from the DA's office.

02:28 15 Q. So, you didn't ask anybody about what the result of that
16 case was or what the Court of Criminal Appeals had said about
17 your testimony in that hearing?

18 A. No.

19 Q. Did you ever hear that the United States Supreme Court had
02:28 20 granted review of the Batson issue in Tompkins?

21 A. No.

22 Q. Do you know whether -- anyone who attended oral argument
23 when that case was argued in front of the United States Supreme
24 Court?

02:28 25 A. No, I do not.

Gray Cross of Davenport

02:28 1 Q. Okay. I'd like to turn to the topic of jury selection in
2 Mr. Rosales' trial. What was the name of the trial judge in
3 Mr. Rosales' trial?

4 A. That was Judge Joe Kegans.

02:29 5 Q. Were you assigned to a courtroom at the time?

6 A. Yes, I was.

7 Q. What was your position at the time of the trial?

8 A. I was the chief prosecutor.

9 Q. And who was your direct supervisor at the time of
02:29 10 Mr. Rosales' trial?

11 A. I think my bureau chief was Keno Henderson. You know, I
12 really can't remember if it was Keno or if it was Rusty Hardin.
13 I don't remember, but they were both bureau chiefs.

14 Q. Okay. Who was -- were you the first chair at Mr. Rosales'
02:29 15 trial?

16 A. Yes, sir.

17 Q. Did you have primary responsibility for the prosecution?

18 A. I did.

19 Q. Had you done most of the work to prepare for trial?

02:29 20 A. Yes.

21 Q. Was this your first capital prosecution as first chair?

22 A. Yes.

23 Q. And who was second chair, Ms. Davenport?

24 A. Keno Henderson.

02:30 25 Q. Had you previously tried any cases with Mr. Henderson?

Gray Cross of Davenport

02:30 1 A. No.

2 Q. How did you come to work on this trial with Mr. Henderson?

3 A. Well, bureau chiefs normally sat second with the chief
4 prosecutor. And if one of them was busy, usually another one
5 sat in. So, that's why I don't remember if Keno was my bureau
6 chief or not.

7 Q. What do you recall about the potential jurors that you
8 interviewed in Mr. Rosales' trial? Do you remember their
9 dress?

02:30 10 A. No.

11 Q. Physical appearance of any of the jurors that you
12 interviewed?

13 A. No.

14 Q. Can you recall the way any individual juror looked at you?

02:30 15 A. Not particularly, no.

16 Q. Do you recall what the potential jurors' voices sounded
17 like?

18 A. No.

19 Q. Okay. Could you please turn to Exhibit 1, Tab 1? That's
02:30 20 in the first binder, the big one.

21 Do you have a copy of the affidavit that you
22 submitted in this matter?

23 A. I do.

24 Q. Is that affidavit based on a refreshed recollection of the
02:31 25 voir dire of Mr. Rosales' trial?

Gray Cross of Davenport

02 : 31 1 A. Well, part of it is. What I looked for in the veniremen
2 was not a refreshed memory but it was a refreshed memory of
3 each one of them as I read through their -- through the
4 transcripts.

02 : 31 5 Q. So, could you explain to me what part of it was not based
6 on a refreshed memory?

7 A. Those items, on the first page, that I told you what my
8 evaluation was based on, the things I looked for.

9 Q. Those things described your general practices?

02 : 32 10 A. Yes.

11 Q. Okay. But with respect to the specific jurors, the reason
12 that you struck the individual jurors, what is the basis for
13 your recollection of those things?

14 A. Partly the transcript, partly my notes that I made on their
02 : 32 15 information sheets that I had that were in the file.

16 Q. Is there anything else that you reviewed to refresh your
17 recollection about the reasons you may have struck specific
18 jurors?

19 A. No. I don't have anything else to refresh my memory.

02 : 32 20 Q. Apart from the transcripts and the notes on the juror
21 cards, do you have an independent recollection of the voir dire
22 of any of the Batson jurors in this trial?

23 A. I remembered parts of it as I was reading through it, yes.

24 Q. Do you recall whether any of the prospective jurors
02 : 32 25 slouched in the pew?

Gray Cross of Davenport

02:32 1 A. They weren't in the pew. They were in the witness --
2 witness chair right by the judge's bench.

3 Q. Do you recall the posture of any of the jurors when you
4 were talking to them?

02:33 5 A. Not specifically, no.

6 Q. Are the reasons that you state in the affidavit speculation
7 about what you think might have been the basis of your strikes,
8 based on a review of the transcript?

9 A. Do I think it was speculation on my part?

02:33 10 Q. Yes, based on a review of the transcript.

11 THE COURT: Could you ask the question again? I'm
12 sorry. I just want to make sure I understood it.

13 BY MR. GRAY:

14 Q. Yes. Are the justifications in the affidavit speculation,
02:33 15 based on a review of the transcript?

16 A. Well, I wouldn't call it "speculation."

17 Q. Could you describe the -- do you have an independent
18 recollection of those justifications, apart from a review of
19 the transcript?

20 A. Just as they relate to the notes I wrote down. That wasn't
21 speculation. That was observing what I had written and seeing
22 how it pertained to that individual.

23 Q. Other than the notes, are the justifications based on a
24 review of the transcripts and your guess as to what was likely
02:34 25 the reason you struck the jurors?

Gray Cross of Davenport

02:34 1 A. Sure.

2 Q. Okay. Did you review any of the documents concerning the
3 seated jurors?

4 A. The transcript, you mean?

02:34 5 Q. Yes.

6 A. Yes, I did.

7 Q. Okay. At your deposition you had not reviewed those. Was
8 that prior to this hearing you reviewed documents?

9 A. Yes.

02:34 10 Q. Do you recall the names of the seated jurors whose
11 transcripts you reviewed?

12 A. Yes. I remember specifically when -- a Ms. Willett.

13 Q. Anyone else?

14 A. I can't think of all their names right now, but that one
02:34 15 stuck in my mind.

16 Q. Did you read the transcript and the juror card of
17 Ms. Willett?

18 A. Yes.

19 Q. Did you read the transcripts of any other jurors? And I
02:34 20 recognize you may not remember their names at this point.

21 A. Yes. Yes, I did read them.

22 Q. Roughly, how many other transcripts did you review?

23 A. There were several others, Plander, Poe -- I think it was
24 Poe.

02:35 25 I can't think of the rest of them.

Gray Cross of Davenport

02:35 1 Q. Okay. And did you read the juror cards of Ms. Plander and
2 Ms. Poe, as well?

3 A. Not prior to today's hearing. I did before the deposition.

4 Q. At your deposition, my recollection is you testified that
02:35 5 you hadn't read the cards of any of the seated jurors.

6 A. And I have -- well, I guess I haven't, then, because I
7 didn't review any of the written information cards prior to
8 this hearing.

9 Q. Okay. Did you read the transcripts for any of the jurors
02:35 10 that were passed by the prosecution but struck by the defense?

11 A. Yes.

12 Q. Do you remember approximately how many of those jurors'
13 transcripts you read?

14 A. I read most of them. I mean, I read most all the
02:36 15 transcripts.

16 Q. Okay. And did you discuss the affidavit that you submitted
17 in this matter with Ms. Miranda?

18 A. You mean prior to submitting it?

19 Q. Yes, ma'am.

20 A. Yes. I sent her a draft of it.

21 Q. Okay. Approximately how many times do you think you
22 discussed that affidavit with Ms. Miranda?

23 A. Once or twice.

24 Q. Okay. I'd like to discuss the timing of the voir dire
02:36 25 process.

Gray Cross of Davenport

02:36 1 A. Okay.

2 Q. You received the voir dire materials prior to questioning
3 individual jurors. Is that right?

4 A. Yes, in groups. There were, like, four, five, or six
5 groups that were brought into the -- in groups of 10 or 12 at a
6 time.

7 Q. And, possibly, that was as soon as the same day that you
8 questioned the juror. Is that right?

9 A. Yes.

02:36 10 Q. Was it sometimes just before you were able to see the juror
11 individually?

12 A. Yes.

13 Q. When you got the juror materials, how did you review them?

14 A. Quickly as I could. I went down and just circled or
02:37 15 underlined anything that stuck out that I wanted to ask about
16 or just take note of.

17 Q. So, you were under time pressure?

18 A. You betcha.

19 Q. Getting ready to ask questions?

02:37 20 A. Yes.

21 Q. Getting ready to make a decision about whether you wanted
22 that juror?

23 A. (Nodding head).

24 Q. Did you look for responses that contained particularly
02:37 25 important information?

Gray Cross of Davenport

02 : 37 1 A. A lot of it was not important, no.

2 Q. What were you looking for?

3 A. Just anything that stuck out.

4 Q. Okay. Could you please turn to Page 32 of your deposition,

02 : 37 5 which is in Exhibit 3?

6 A. Page 32?

7 Q. Yes, ma'am. Line 10.

8 A. Okay.

9 Q. You list how long they lived there, whether they were

02 : 38 10 married, whether they were employed, whether they had been a

11 victim of a crime or a witness or a complainant in a criminal

12 case, whether they'd ever served on a jury, and how old they

13 are.

14 Are those things that are pretty important to

02 : 38 15 you, that you list there?

16 A. Those are things that -- that I note, yes.

17 Q. And those were -- were those things that you would be

18 looking for when you were quickly reviewing juror cards under

19 time pressure --

02 : 38 20 A. Yes.

21 Q. -- in the courtroom?

22 A. Correct.

23 Q. Ma'am, did you note the race of the juror when you were

24 reviewing juror cards?

02 : 38 25 A. Sometimes I did.

Gray Cross of Davenport

02:38

1 Q. Why would you do that?

02:38

2 A. Well, because Mr. Boyd brought that up in our case. At the
3 end of each venireman who was struck or accepted, he would note
4 on the record whether this was a Black male, a Hispanic female,
5 a redhead White woman. And, so, I kept -- started keeping
6 track, as well.

02:39

7 Q. Okay. I'd like you to turn to Tab 20, please, of Binder 1.

8 A. The big -- the one --

9 Q. Yes, ma'am.

10 And the first page -- this is the tab that
11 contains the juror materials for Esmerelda Lopez.

12 A. Okay.

13 Q. The first page of her questionnaire, there's a handwritten
14 note, "MF" --

15 A. I must be on the wrong page.

16 Q. Take your time here. I'm going -- I'm in Tab 20, and I'm
17 on the third page in.

18 A. Oh, okay. Third page in. Okay.

19 Q. Okay. It says "MF 38." And you previously testified that
02:39 20 "MF" stood for "Mexican female"?

21 A. Yes.

22 Q. Do you recall when you interviewed Potential Juror
23 Esmerelda Lopez?

24 A. When I interviewed her?

02:40 25 Q. Yeah. What -- in the voir dire order, when was she

Gray Cross of Davenport

02:40

1 interviewed?

2 A. I couldn't tell you without looking at my list.

3 Q. Okay. Do you recall when Mr. Boyd first raised the Batson
4 objection -- the pre Batson objection in this trial?

02:40

5 A. When he first raised the pre Batson?

6 Q. When was that objection entered into the record of this
7 trial?

8 A. I don't know.

9 Q. I'll represent to you it was the beginning of the second
02:40 10 day of voir dire. And Esmerelda Lopez was the first juror that
11 you interviewed on the first day of voir dire.

12 So, my question to you is why would you be noting
13 the race of a juror that you interviewed on the first day of
14 voir dire if the Batson objection hadn't been entered yet into
02:40 15 the record.

16 A. I'm not following you.

17 Q. Well, ma'am, you testified that the reason you noted the
18 race of the jurors on the questionnaires is because the defense
19 lawyer had raised a Batson objection, for lack of a better
02:41 20 term, and that that caused you to note the race of some of the
21 jurors on the cards.

22 This juror was the first juror you interviewed,
23 and it was one day before that objection had been entered. So,
24 my question is why would you be noting, on the first juror card
02:41 25 you saw, the race of Ms. Lopez if the objection had not been

Gray Cross of Davenport

02:41

1 entered yet.

2 A. Are you telling me that he did not put on the record that
3 the -- the race and sex of each individual as they testified?

4 Q. Once he raised the objection, the judge put that
5 information on the record the second day of voir dire.

6 A. Okay. And Ms. Lopez came the second day?

7 Q. No. Ms. Lopez came -- was the first juror the first day.

8 A. Oh, I don't know.

9 Q. So, you're not sure why you noted that she was a Mexican
02:42 10 female?

11 A. No. But I assumed it was because of the notations that
12 Mr. Boyd was putting on the record.

13 Q. Okay. The note below "MF," reads, "Lives N of downtown."
14 You previously testified that Ms. Lopez -- excuse me -- that
02:42 15 you noted that on jurors where there was a missing address on
16 their juror forms.

17 A. You see the second line there? It says, "What part of town
18 or county do you live?" And it says, "North."

19 Q. Right. My question to you is where is the missing address
02:42 20 on this juror questionnaire.

21 A. Well, it just says "north." And I don't know where "north"
22 is.

23 Q. Does this form call for Ms. Lopez' address?

24 A. No. The other one that I told you about has -- that second
02:42 25 line asks for the address rather than the part of town.

Gray Cross of Davenport

02:42 1 Q. Okay. If you could please turn to Esmerelda Lopez' juror
2 card, on the prior page, at the top card [sic].

3 A. Okay.

4 Q. Does that card contain a printed copy of her address?

02:43 5 A. I'm sure it does, but it's blacked out; so, I can't read
6 it.

7 Q. All right. But to your recollection -- one can make out
8 that there is something written there; and it looks like her
9 name and three lines, the way an address would be.

02:43 10 Is it your recollection, that the address was
11 provided on these juror cards?

12 A. Yes, they are on those juror cards.

13 Q. Okay. So, why would you be needing to note "north of
14 downtown" if the address is already provided on the juror
02:43 15 cards?

16 A. It's just a way of knowing where they live, what part of
17 town they live in, so that we don't end up with jurors who are
18 familiar with the -- the location of the murders.

19 Q. Was it your -- could you -- was that because you didn't
02:43 20 want to have jurors that came from the same place as the crime
21 scene --

22 A. Yes.

23 Q. -- where the crime had taken place?

24 A. Yes.

02:44 25 Q. Do you recall where Mr. Rosales' crime had taken place?

Gray Cross of Davenport

02:44 1 A. I think it was in -- seems like it was in Pasadena, but I'm
2 not really sure.

3 Q. Is Pasadena anywhere near north of downtown?

4 A. No, it's not.

02:44 5 Q. What other clues of the jurors' potential race were you
6 looking for?

7 MS. MIRANDA: Your Honor, I object to the form of that
8 question.

9 MR. GRAY: The question is withdrawn.

02:44 10 THE COURT: Okay.

11 BY MR. GRAY:

12 Q. Did you look for other clues, such as where the juror was
13 born, when you were reviewing the juror questionnaires?

14 A. Only if it was something unusual.

02:44 15 Q. Would you look at what the jurors -- what publications the
16 juror read?

17 A. Sometimes.

18 Q. If you could please turn to Tab 22, which contains the
19 juror information for Alicia Taylor.

02:45 20 A. Okay.

21 THE COURT: I'm sorry. What exhibit were you in?

22 MR. GRAY: I'm sorry. I'm in Tab 22 of Volume 1, and
23 I'm -- one, two -- three pages in. It's the first page of
24 Ms. Taylor's juror questionnaire.

02:45 25 THE COURT: Okay. Oh, I see.

Gray Cross of Davenport

02:45 1 BY MR. GRAY:

2 Q. Your note in the upper left-hand corner, "Educated BF,
3 articulate." Does the notation stand for "Black female"?

4 A. It does.

02:45 5 Q. And do you recall why you noted that on Ms. Taylor's card?

6 A. I have no idea. Because it was obvious.

7 Q. Do you recall any relevance to Mr. Rosales' trial?

8 A. Relevance of what?

9 Q. The -- her race, was there a relevance -- was it relevant
02:46 10 to the issues in Mr. Rosales' trial?11 A. No. But you have to make notations so you can remember who
12 people are.13 Q. Could you please turn to Tab -- actually, no. We'll move
14 on to the next one.

02:46 15 In Volume 1B I'd like to turn to Tab 38, please.

16 A. Volume --

17 Q. It's the smaller of the two large bound volumes. And --

18 A. Tell me the tab again.

19 Q. Okay. In the first page of Mr. Alcover's --

02:47 20 A. I'm sorry. I don't know what tab.

21 THE COURT: I don't either.

22 MR. GRAY: I'm sorry. Tab 38.

23 BY MR. GRAY:

24 Q. Again, on the first page of the juror questionnaire, you
02:47 25 circled "Puerto Rico." Do you recall why you circled "Puerto

Gray Cross of Davenport

02:47 1 Rico" on his juror questionnaire?

2 A. It's unusual.

3 Q. What's unusual about being born in Puerto Rico?

4 A. Well, I don't know that I'd ever had any other people
02:47 5 report for jury duty who had been from Puerto Rico.

6 Q. Okay. Do you recall any relevance to Mr. Rosales' trial --

7 A. No.

8 Q. -- of being born in Puerto Rico?

9 A. No.

02:47 10 Q. Okay. Could you please turn to Tab 17 in the first volume?

11 A. Okay.

12 Q. Tab 17 relates to the materials for Mr. Mohamed Deen?

13 A. Yes.

14 Q. And at the top of Mr. Deen's questionnaire, you circled
02:48 15 that he lived in Guyana -- or excuse me -- that he was born in
16 Guyana?

17 A. Yes.

18 Q. Do you recall why you circled that?

19 A. Because it was unusual.

02:48 20 Q. Do you recall any relevance to Mr. Rosales' trial --

21 A. No.

22 Q. -- the mention of Guyana?

23 Okay. Ms. Davenport, you testified that you
24 noted the jurors' races so that you could remember who they
02:48 25 were. In a death penalty case, how does one voir dire jurors?

Gray Cross of Davenport

02:48 1 Does it take place in groups or individually?

2 A. No. It's individual.

3 Q. Why was it necessary to remember who a juror was when you
4 were voir-diring them individually?

02:49 5 A. Because at the end of the day, when we would sit back to
6 see what we had done, we couldn't remember who we talked to.
7 Sometimes it takes two weeks to get a jury; and the jury walks
8 in, you see them all together for the first time, you don't
9 even recognize them.

02:49 10 Q. So, at the time of trial you wanted to be able to remember
11 the jurors that you had voir-dired?

12 A. I was just trying to remember everything I could about each
13 juror.

14 Q. Wouldn't it be more convenient to go by a juror's name if
02:49 15 you wanted remember in trial who they were?

16 A. If I could remember all their names, that would be nice.

17 Q. Would you have a list of the names of the jurors?

18 A. Yes.

19 Q. Okay.

02:49 20 A. And we went through 65 names.

21 Q. But by the time they were seated, you were down to 13?

22 A. Yes.

23 Q. And you knew who they were?

24 A. Yes.

02:50 25 Q. Do you recall whether you ever noted the race of a White

Gray Cross of Davenport

02:50 1 prospective juror when you were interviewing them?

2 A. I don't know. I didn't notice any.

3 Q. Okay. We were discussing previously the neighborhood in
4 Houston where prospective jurors lived, and you said that you
5 sometimes noted the neighborhood of Houston on -- where a juror
6 lived on the prospective juror's card so that you could ask
7 them relevant hypothetical questions based on landmarks from
8 their neighborhood that might be familiar to them. Is that
9 correct?

02:50 10 A. Sometimes, yes.

11 Q. And why would that be helpful to you?

12 A. Sometimes it's just helpful in making conversation when
13 you're not asking anything particularly about the law that's
14 involved in a case or the facts involved in a case.

02:51 15 Q. Could you point us toward any example of a hypothetical
16 question that you asked in this voir dire process based on a
17 landmark from a juror's neighborhood?

18 A. No, sir.

19 Q. Okay. I'd like to please turn to Volume 1B, Tab 40.

02:51 20 THE WITNESS: Is that the big one?

21 A. I'm sorry. Is that the big one?

22 BY MR. GRAY:

23 Q. That's the smaller of the two large volumes, ma'am.

24 A. Okay. 1B, Tab 40?

02:51 25 Q. I need to catch up with you here. I apologize. Just one

Gray Cross of Davenport

02:52

1 second.

2 No. I'm sorry. I mean Tab 41. Excuse me.

3 Okay. And this is -- on the first page of the
4 juror questionnaire for Lorene Thornton, you noted, "North of
02:52 5 downtown"?

6 A. Yes.

7 Q. All right. Was this the same part of Houston that we --
8 you had in mind when you made that notion on Esmerelda Lopez'
9 card?

02:53

10 A. I don't know. I just know what it says.

11 Q. Okay. And on -- okay. Tab 21 in the first volume, please,
12 ma'am.

13 This is the juror questionnaire for Edward Saenz?

14 THE COURT: "Saenz."

02:53

15 MR. GRAY: "Saenz"? Thank you, your Honor.

16 BY MR. GRAY:

17 Q. On Mr. Saenz' juror questionnaire you noted "North of
18 downtown" next to his address. Is that the same part of town
19 that you had in mind when you made that notion on Esmerelda
02:54 20 Lopez' card?

21 A. I can't tell you. It says, "North of downtown."

22 Q. How did you know that 507 Post Street was north of
23 downtown?

24 A. I don't know. Because I don't know that address.

02:54

25 Q. Post Street is a pretty small street. It's only a couple

Gray Cross of Davenport

02:54 1 of blocks long. Do you recall how you were able to find out
2 what part of Houston --

3 A. I don't know.

4 Q. -- Post Street was located in?

02:54 5 Is that something you would ask your office to
6 look up when your office ran background checks on prospective
7 jurors?

8 A. We didn't run background checks on prospective jurors.

9 Q. Do you recall if you used a map or anything else to look up
02:54 10 the addresses of jurors and found out where they lived?

11 A. I don't know how I did that, because it doesn't even have a
12 zip code on it. I don't know.

13 Q. Was it your practice to bring in a map of an index of the
14 city -- the streets in the City of Houston during voir dire?

02:54 15 A. No.

16 Q. If you could, turn to Tab 13, Line 7. Sorry. Page -- it's
17 the -- I'm sorry. It's the second page in, Line 2.

18 This is Mr. Solorzano's juror questionnaire. And
19 there is a note at the end, which we previously discussed; and
02:55 20 you said -- it says, "Deep Montrose."

21 A. Okay, yes.

22 Q. How did you know that 504 Richmond Street was "deep
23 Montrose"?

24 A. Well, I know Richmond.

02:55 25 Q. You know Richmond?

Gray Cross of Davenport

02:55

1 A. Uh-huh.

2 Q. Okay. Do you know the street numbers on Richmond?

3 A. Yes.

4 Q. Other than "Montrose" and "North of downtown" and
02:55 5 "Northeast of downtown," do you recall whether you noted any
6 other neighborhoods on the juror cards or juror questionnaires
7 in this voir dire process?8 A. I don't know. I'm sure they're reflected on there if I
9 did.02:56 10 Q. Okay. To my knowledge, there's no other neighborhoods
11 noted on the cards and questionnaires in this record.12 MS. MIRANDA: And, your Honor, I'm going to object to
13 him putting that testimony in the record. We intend -- I mean,
14 I think that the record will state for itself --

02:56 15 MR. GRAY: The record will speak for itself.

16 MS. MIRANDA: -- what's there.

17 Thank you.

18 BY MR. GRAY:

19 Q. Were you concerned that people who lived in Montrose or
02:56 20 north of downtown or northeast of downtown might not identify
21 with you, Ms. Davenport?

22 A. No.

23 Q. Were you concerned that people who lived in Montrose and
24 north of downtown or northeast of downtown might sympathize
02:56 25 with the accused person in a trial?

Gray Cross of Davenport

02:56 1 A. Not because of where they lived, no.

2 Q. In what sense might they sympathize with the accused? What
3 about them might cause them to sympathize with the accused?

4 A. I said, "Not because of where they lived, no."

02:56 5 Q. Was there something that might cause them to sympathize
6 with the accused?

7 THE COURT: Wait a minute. Who are we talking about
8 now?

9 I'm completely lost. I mean, you asked about the
02:57 10 neighborhoods. Now, what else are we talking about? Which
11 jurors are we talking about?

12 MR. GRAY: Why she was -- I'll withdraw the question,
13 your Honor.

14 BY MR. GRAY:

02:57 15 Q. My question was whether there was something about the
16 neighborhoods that was -- caused you to be concerned about
17 whether the people who lived in those neighborhoods might
18 sympathize with the accused.

19 THE COURT: I thought she already answered that
02:57 20 question.

21 MR. GRAY: Okay. Let's move on.

22 BY MR. GRAY:

23 Q. I'd like to please turn onto -- move to Tab 7, which
24 contains the juror materials for Jeanette Lewis.

02:57 25 Okay. At the bottom of the first page of

Gray Cross of Davenport

02:57 1 Ms. Lewis' juror questionnaire, you wrote, "Really don't have
2 any problems."

3 Do you recall why you made that notation on
4 Ms. Lewis' card?

02:58 5 A. Not unless Keno and I were writing notes to each other. I
6 don't know.

7 Q. Do you think that might have been a note that you were
8 writing to Keno?

9 A. Could be.

02:58 10 Q. Why did you expect that you might have a problem with
11 Jeanette Lewis?

12 A. I don't know that I expected to have any problems with
13 Jeanette Lewis.

14 Q. Okay. Ms. Lewis had the strongest support for capital
02:58 15 punishment, on her capital punishment survey, of any juror that
16 you interviewed. Is that correct?

17 A. I don't know.

18 Q. She was a 5 and a 4?

19 A. She was a 5 and a 4?

02:58 20 Q. Please turn to the "Capital Punishment Attitude
21 Questionnaire" for Ms. Lewis, which is a few pages forward from
22 where you are.

23 She checked 5, "I'm strongly in favor of capital
24 punishment as an appropriate penalty" and, 4, "I would usually
02:59 25 vote for the death penalty in a case where the law allowed me

Gray Cross of Davenport

02:59 1 to."

2 A. Yes. Okay.

3 Q. Are those favorable responses?

4 A. Yes.

02:59 5 Q. Are those among the strongest responses you -- one might
6 expect to see from a juror during voir dire?

7 A. I think so.

8 Q. Ms. Lewis is an African-American. Is that correct?

9 A. Yes, she is.

02:59 10 Q. Did you write "I really don't have any problems" on the
11 cards of White jurors who were obviously very good jurors for
12 the State?13 A. I don't know that I wrote that on anybody else's card at
14 this time.02:59 15 Q. Did you seat any other African-American jurors in this
16 trial? Did you allow any other African-Americans to be seated?

17 A. Did I allow any to be seated?

18 Q. Yes. Were there any other African-Americans who --

19 A. Not that I recall.

02:59 20 Q. Please turn to Tab 13 for Mr. Solorzano's materials.

21 If you could, please, look at the notes at the
22 bottom of the page. The first line of the notes at the bottom
23 of the page is, "Is his heritage Asian or Mexican or both?"
24 Why did you write that question, Ms. Davenport?

03:00 25 A. Obviously, because I don't know. It was a question.

Gray Cross of Davenport

03 : 00 1 Q. To whom did you address that question?

2 A. Probably myself.

3 Q. Why did you want to know whether Mr. Solorzano was Asian or

4 Mexican?

03 : 00 5 A. Just curious, frankly.

6 Q. Was -- were you at all concerned that he might identify

7 with the accused?

8 A. Well, if I was, it wasn't too concerning, since he ended up

9 on the jury.

03 : 00 10 Q. But that was possibly a concern of yours?

11 A. I don't know that I would say it was a concern. That's

12 your word.

13 Q. But you did write a note asking at the bottom of the page,

14 "Would he identify with the defendant."

03 : 01 15 If you look at the last line of -- just before

16 where the Xerox stops.

17 A. Okay. Yes, I see that.

18 Q. Does your note reflect a concern that he might identify

19 with the accused?

03 : 01 20 A. I was wondering about it, yes.

21 Q. Okay. Please turn to Tab 19, which contains the juror

22 materials for Yvette Holmes.

23 If you please would look at the second page, and

24 it's Item Number 24 at the bottom of the second page there.

03 : 02 25 A. Okay.

Gray Cross of Davenport

03 : 02 1 Q. Ms. Holmes indicated that she read four publications,
2 "Ebony," "Jet," "Newsweek," and "Post." Do you see that?

3 A. Yes.

4 Q. Okay. And you underlined "Ebony" and "Jet" but not
03 : 02 5 "Newsweek" and "Post." Do you see that?

6 A. Yes.

7 Q. Do you recall why you underlined "Ebony" and "Jet" in
8 Ms. Holmes' answer to that question?

9 A. No. I just thought it was interesting.

03 : 02 10 Q. Did you know that Ms. Holmes was probably Black?

11 A. I suspected she was. I mean, she was sitting right in
12 front of me. I could see her.

13 Q. Do you think that you -- your recollection is you
14 underlined those two publications when you were speaking with
03 : 02 15 Ms. Holmes or when you were reviewing the juror questionnaire?

16 A. When I was speaking with her.

17 Q. How do you have a recollection of when you made that
18 underlining?

19 A. Because I didn't have it ahead of time. I got them when --

03 : 03 20 THE COURT: (Indicating).

21 THE WITNESS: I would love some water. Thank you.

22 MR. GRAY: Please, take a break.

23 THE WITNESS: Thank you.

24 Did I answer your question?

03 : 03 25 THE COURT: I don't remember. I forgot.

Gray Cross of Davenport

03 : 03

1 BY MR. GRAY:

2 Q. We were discussing whether you got the questionnaire prior
3 to seeing the individual juror and having an opportunity to
4 interview the individual potential juror.

03 : 03 5 A. Yeah. I think I filled them out just as they were coming
6 in. And while -- and while the judge is reading her two or
7 three page speech to each individual juror, I have a couple
8 minutes to do that.

9 Q. Okay. Do you know whether any of the notations you made on
03 : 03 10 Ms. Holmes' form were made before the potential juror entered
11 the room or after? Do you have a recollection of that today?

12 A. I think it's after she enters the room.

13 Q. What's the basis for your recollection that it was after
14 she entered the room?

03 : 04 15 A. I just don't remember having all 10 or 12 of them at the
16 same time.

17 Q. And my question was what's your recollection for recalling
18 the time when you made the notations on this form as compared
19 to the times when you first saw Ms. Holmes.

03 : 04 20 A. I would first see Ms. Holmes when she came in, in a group
21 of 10 to 12 people. I would see her for a few minutes -- all
22 of them for a few minutes.

23 And I can't remember if the bailiff gave us all
24 of their information in a big stack or one at a time. I just
03 : 05 25 don't remember.

Gray Cross of Davenport

03 : 05 1 But I wouldn't have time to go through hers until
2 we got to her.

3 Q. At the time that the group of -- the panel came into the
4 courtroom, would you know the names of the panelists when they
5 were first instructed by the judge?

6 A. No. No. Not until they handed us the sheets. Because
7 they were not individually voir-dired then.

8 Q. Okay. Okay. Do you -- please move to Page 1221 of
9 Ms. Holmes' testimony.

03 : 05 10 A. Where is Page 1221?

11 Q. If you'd go to the transcript of Ms. Holmes' voir dire
12 testimony, which is after the blue sheet, behind that tab,
13 please go to 1221.

14 A. Okay.

03 : 06 15 Q. You asked Ms. Holmes whether she thought it was fair that
16 the same burden of proof should apply in both a traffic case
17 and in a capital case. Do you see that?

18 A. Okay.

19 Q. Doesn't your question imply that there ought to be a
03 : 06 20 greater burden of proof in a capital case than in something as
21 minor as a traffic case?

22 A. I'm not implying that there should be. I'm asking whether
23 she thinks that there should be.

24 Q. And how did Ms. Holmes answer your question?

03 : 06 25 A. I asked her if she thought that was fair; and she said,

Gray Cross of Davenport

03:06 1 "Say that again."

2 And I asked her again; and she said, "I agree."

3 Q. Okay. Is there something about Ms. Holmes' view that
4 "beyond a reasonable doubt" is a fair burden, that causes you
03:07 5 any concern?

6 A. Not from what's written on the page, no.

7 Q. Okay. You then asked whether she would hold the State to a
8 greater burden, such as "beyond all doubt."

9 And Ms. Holmes answered, "I think it," meaning
03:07 10 "beyond a reasonable doubt," "is right, based on the evidence."

11 Does that answer cause you any concern?

12 A. I don't know if that's what "it" refers to or not.

13 Q. Oh, okay. What do you think "it" might refer to if it's
14 not "beyond a reasonable doubt"?

03:07 15 A. "Would you make us prove it to you beyond all doubt, for
16 instance?" Maybe she meant that's what's all right. I don't
17 know.

18 Q. You then asked Ms. Holmes whether she feels like the burden
19 of proof "beyond a reasonable doubt" -- excuse me -- we're now
03:07 20 on Page 1222, Line 10 -- feels like the burden of proof "beyond
21 a reasonable" doubt is fair from -- for the penalty portion or
22 in the penalty portion would she require the State to prove a
23 little bit more than just "beyond a reasonable doubt."

24 I'd like to focus on the phrase "a little bit
03:08 25 more than just 'beyond a reasonable doubt.'" Do you recall why

Gray Cross of Davenport

03 : 08 1 you used the word "just" to describe the highest standard of
2 proof in our legal system?

3 A. You know, a lot of people think that the burden of proof is
4 "beyond all doubt" or "beyond a shadow of the doubt." And we
03 : 08 5 have to deal with that on voir dire because some veniremen
6 think that's what we have to prove.

7 Q. Were you -- how did Ms. Holmes respond to your question?

8 A. She said, "If you have proved it beyond a reasonable doubt,
9 then that would be adequate."

03 : 09 10 Q. Are you satisfied with her answer to that question? Is
11 that a question -- answer that raises any concern for you?

12 A. No.

13 Q. Okay. I would like to talk about the justifications for
14 the strike against Ms. Holmes, that you gave during your
03 : 09 15 deposition. If you could please turn to --

16 THE COURT: You know what? This is a good place for a
17 break.

18 Gentlemen with Mr. Rosales, we're going to take a
19 break. How long do we need to give you to be able to have a
03 : 09 20 reasonable break? Is ten minutes enough?

21 Mr. Rosales, could you -- could you get the
22 attention of --

23 MR. ROSALES: Yes, your Honor.

24 THE COURT: I'm trying to get the attention of the
03 : 09 25 gentlemen that are behind you, the guards that are with you.

Gray Cross of Davenport

03:09 1 What's a reasonable break for us to be able to
2 take for you guys to take a break? Can we do it in ten minutes
3 or do you need more than that?

4 A PRISON GUARD: We don't go anywhere, ma'am. We'll
03:09 5 just stay right here.

6 THE COURT: Oh, okay. There's no place that they
7 can -- okay. So, then, let's just take a break for just ten
8 minutes, then.

9 A CLERK: All rise.

03:21 10 *(Recess taken from 3:09 to 3:31 p.m.)*

11 THE COURT: All right. Please be seated, everyone.

12 We ready to go? Mr. Gray?

13 MR. GRAY: Thank you, your Honor.

14 THE COURT: Yes.

03:31 15 BY MR. GRAY:

16 Q. Ms. Davenport, are ready to resume testimony?

17 A. Yes, sir.

18 THE COURT: Could you keep your voice up. I could
19 barely hear you that time. I just want to make sure that
03:31 20 Mr. Rosales can still continue to you hear you.

21 MR. GRAY: Okay.

22 THE COURT: So, what did you just say? Did you say,
23 "Are you ready to resume testimony?"

24 MR. GRAY: "Are we ready to resume testimony," yes,
03:32 25 your Honor.

Gray Cross of Davenport

03 : 32 1 THE COURT: All right.

2 BY MR. GRAY:

3 Q. We were about return to the justifications that you gave
4 during your deposition for the peremptory strikes that you
03 : 32 5 exercised against Ms. Holmes. And if you could please turn to
6 Tab 1 of Exhibit 3, Page 44, Line 12.

7 A. Exhibit 3, page what?

8 Q. It's the exhibit that contains your deposition.

9 A. Okay. I got that.

03 : 32 10 Q. Behind Tab 1.

11 A. Okay.

12 Q. Page 44, please. Are you with me on Line 12?

13 A. Okay.

14 Q. You answered that, "You'll notice a number of times in
03 : 32 15 there the Court has interjected to either clarify what she
16 thought was -- I was trying -- excuse me -- what she thought I
17 was saying or to tell the witness or the juror that, 'You've
18 got to tell us. We can't read your mind.' And when that
19 happens on a number of times, the atmosphere in the room would
03 : 33 20 get tense and the juror or veniremen would get tense and a
21 little insulted and angry and the judge would, as well.

22 "I remember a number of times when that happened,
23 when the judge kept inserting comments in there. And sometimes
24 it was just not worth the chance of putting a juror on trial --
03 : 33 25 on jury, who was already angry at the judge or me."

Gray Cross of Davenport

03 : 33 1 Did you exercise a peremptory strike against
2 Ms. Holmes because she was already angry at the judge or
3 yourself?

4 A. I think the real reason I exercised a peremptory on
03 : 33 5 Ms. Holmes is that I think that Mr. Boyd -- Walter Boyd thought
6 that she would hang the jury for us.

7 Q. Okay. Did you previously testify that you believed that
8 you struck Ms. Holmes because you thought she was angry at the
9 judge or yourself?

03 : 33 10 A. Yes, I did. And that's probably part of it, too. But I
11 think that Mr. Boyd was counting on her to hang the jury.

12 Q. Okay. If you could please turn to Page 48, Lines 11
13 through 16?

14 THE COURT: Are you attempting to impeach the witness
03 : 34 15 by going through her deposition? Why can't you just ask this
16 witness questions? I mean, you've already gone through this.
17 Ask her some questions. We don't have to just keep reading
18 through deposition testimony.

19 It's relevant if it's there for impeachment; but
03 : 34 20 you're just, like, reading the testimony. That's not
21 appropriate. Come on, now.

22 MR. GRAY: Okay, your Honor. I'll move forward.

23 Actually, your Honor --

24 THE COURT: I mean, we don't even have a question on
03 : 34 25 the floor. Just going and reading through the deposition is

Gray Cross of Davenport

03 : 34

1 completely inappropriate.

2 I mean, I let you do it for the first couple of
3 hours. But, good grief, we're going to be here five days if we
4 keep doing this.

03 : 34

5 MR. GRAY: Okay.

6 THE COURT: This is not appropriate, to just to keep
7 going through the deposition just reading. You can ask this
8 witness questions. We clearly understand this is her direct
9 testimony.

03 : 34

10 Ask her a question. If it relates to the direct
11 testimony, great. But you don't have to just keep reading
12 through the deposition.

13 MR. GRAY: Okay.

14 BY MR. GRAY:

03 : 35

15 Q. Okay. Sitting here today, Ms. Davenport, do you know
16 whether Ms. Holmes was angry at you or the judge?

17 A. No, I didn't.

18 Q. Do you know whether Ms. Holmes' being angry was a reason
19 that you exercised a peremptory strike against her -- strike
20 against her?

21 A. I think the reason I exercised a strike against her is what
22 I told you a moment ago. I think that Mr. Boyd wanted her on
23 the jury, and I think she would have hung the jury for him; and
24 I think that's what he was counting on.

03 : 35

25 Q. Okay. So, your -- that's the sole justification for why

Gray Cross of Davenport

03 : 35 1 you struck an -- exercised a peremptory strike against
2 Ms. Holmes?

3 A. That's what I can remember 23 years later, yes.

4 Q. And the other things we discussed in your deposition --

03 : 35 5 A. Yes.

6 Q. -- are not reasons that you think you exercised a
7 peremptory strike against Ms. Holmes?

8 A. Well, I -- they could be reasons. I don't just have to
9 have one reason for striking someone.

03 : 35 10 Q. Do you have more than one reason for striking Ms. Holmes,
11 is my question.

12 A. Anything I explained to you in the deposition and what I've
13 told you today.

14 Q. Your answer is not clear to me. I don't know whether
03 : 36 15 Ms. Holmes being angry at you or Judge Kegans was a reason you
16 exercised a strike or peremptory --

17 A. I don't know if she was angry at anybody, but it gets
18 uncomfortable when a judge reprimands someone who is on the
19 witness stand.

03 : 36 20 Q. Was it common for Judge Kegans to participate in
21 questioning potential jurors?

22 A. Oh, yes. I'm sure you read that all the way through there.

23 Q. Did Judge Kegans participate in questioning jurors who you
24 allowed to be seated on the jury?

03 : 36 25 A. She didn't question them. She explained what she thought

Gray Cross of Davenport

03 : 36 1 the lawyers in the case were trying to ask the jurors.

2 Q. But she interjected --

3 A. Yes --

4 Q. -- and participated in the manner she did with Ms. Holmes?

03 : 36 5 A. -- she did.

6 Q. Was there something different about the way she
7 participated in the questioning of Ms. Holmes --

8 A. Not particularly.

9 Q. -- and the other jurors you seated, that raised a
03 : 36 10 particular concern for Ms. Holmes?

11 A. Not particularly, that I can remember.

12 Q. Okay. Is a reason that you struck Ms. Holmes that she did
13 not have particularly good answers on Special Issue 1 -- on
14 special issues, particularly with respect to temporary insanity
03 : 37 15 due to voluntary intoxication? Was that a concern?

16 A. I think it was the overall feeling we had about Ms. Holmes.
17 I don't know if it was those particular reasons about special
18 issues or not.

19 Q. When did you recall that you struck Ms. Holmes because
03 : 37 20 Mr. Boyd thought that she might hang the jury?

21 A. When I was reading through all of these again prior to this
22 hearing.

23 Q. Would you have been concerned if Mr. Boyd asked similar
24 questions of White jurors and they testified that they would
03 : 38 25 maintain their position even if they disagreed with some of the

Gray Cross of Davenport

03:38

1 other jurors on a panel?

03:38

2 A. Depends on how he asked them. Mr. Boyd could get quite
3 animated when he would get excited when he thought he had
4 something to work with.

03:39

5 Q. Do you recall whether Mr. Boyd was animated in his
6 conversation -- or his interview of Ms. Holmes?

7 A. Specifically? No, I didn't.

8 Q. Could you please turn to the transcript of Cheryl
9 Williamson, which is at Tab 15 and at Page 47, please?

10 A. Okay.

11 Q. This is during the examination of Ms. Williamson by
12 Mr. Boyd. Please turn to Line -- the question that begins on
13 Line 4.

14 Mr. Boyd begins, "Let me ask you this. If you
15 were called upon to do so, would you be able, if you were the
16 only juror standing" --

17 MS. MIRANDA: I'm sorry. Could you hold on? She's
18 having trouble finding the page.

19 MR. GRAY: Oh, excuse me. I apologize.

20 THE COURT: I think it's Page 47.

21 THE WITNESS: Thank you.

22 Okay. Sorry.

23 BY MR. GRAY:

24 Q. Are you with me, Ms. Davenport?

25 A. Okay.

Gray Cross of Davenport

03 : 39 1 Q. Line 4, "Let me ask you this. If you were called upon to
2 do so, would you be able to, if you were the only juror
3 standing for one proposition and 11 jurors stood against you
4 but yet you were unpersuaded to the very end that the 11 were
03 : 39 5 right and you were very persuaded your stand was right, would
6 you have the courage to stand with that decision forever?"

7 And Ms. Williamson answers, "Yes."

8 Why wasn't that answer a concern for you?

9 A. Because you're taking it out of context. And we had to
03 : 40 10 evaluate jurors based on everything they said during that hour
11 and everything that we noted about them, how they sounded, how
12 they looked, the whole 9 yards.

13 Based on that one -- that one question? I can't
14 answer your question.

03 : 40 15 Q. Could we turn back to the transcript of Ms. Holmes, please,
16 which is at Tab 19? Okay. And at Page 1239, Line 16, please.

17 No?

18 THE COURT: Page what?

19 MR. GRAY: Excuse me. That's not the right page.

03 : 41 20 THE COURT: Maybe 1239 or --

21 MR. GRAY: No. It's 1243, please. I apologize.

22 BY MR. GRAY:

23 Q. Okay. When Mr. Boyd asked a similar question to
24 Ms. Holmes, "If you were the one -- if you had a position
03 : 42 25 and -- well, let me start over. If you were on the jury and

Gray Cross of Davenport

03 : 42 1 you stood for a certain position and you felt a certain way but
2 11 other jurors felt the opposite way on a particular issue
3 that the jury is called upon to pass judgment on, would you be
4 able to persist in your view until you were persuaded that the
03 : 42 5 11 other jurors were correct and you were wrong?"

6 And she answers, "Unless they could show me where
7 I was wrong, I would not be persuaded."

8 Is there a difference, between Ms. Holmes' answer
9 and Ms. Williamson's answer, that causes you to favor
03 : 42 10 Ms. Williamson and have a concern about Ms. Holmes?

11 A. What's different is that Mr. Boyd started out by asking
12 her -- that's his first question, and that's not how he started
13 out with everybody else.

14 Q. Would you agree with me that Ms. Holmes expressed a
03 : 42 15 willingness to be persuaded, based on the facts, in her
16 conversations with other jurors?

17 A. That Ms. Holmes expressed a willingness --

18 Q. The statement, "Unless you could show me where -- that they
19 could show me where I was wrong," indicated a willingness to be
03 : 43 20 persuaded by her fellow jurors?

21 A. Yes.

22 Q. Okay. And I'd like to turn back to Tab 15 for Page 47,
23 which is Ms. Williamson again. I apologize for all the
24 shifting back and forth.

03 : 43 25 Mr. Boyd asks, at the bottom of the page on Page

Gray Cross of Davenport

03 : 43 1 21, "Any decision you reach in a case would have to be just as
2 if you were the only juror sitting on the jury. Do you have
3 the courage to reach that sort of decision and to persist in
4 your beliefs indefinitely?"

03 : 43 5 And Ms. Williamson answers, "Yes."

6 Do you see a difference between Ms. Williamson's
7 answer and Ms. Holmes' answer that would affect your decision
8 about which juror to allow to be seated?

9 A. Wasn't his first question to her.

03 : 44 10 Q. Could you please turn to the transcript of Beverly Willett,
11 at Tab 14?

12 And at Page 312, Mr. Boyd asks, "But could you
13 persist for an indefinite time to hold your views if you were
14 unpersuaded to take another view, even though 11 other jurors
03 : 45 15 might stand against you?"

16 "It wouldn't be the first time. Not that
17 particular number, no. But if I believe I'm right, I'm willing
18 to stand up for it."

19 And Mr. Boyd follows up, "And if you believed you
03 : 45 20 were right about a reasonable doubt, you would stand up for it,
21 would you not?"

22 And she replies, "Yes, sir."

23 Why was this response not a concern for you if
24 you were concerned about Ms. Holmes?

03 : 45 25 A. It wasn't the first question he asked her. And it --

Gray Cross of Davenport

03 : 45 1 frankly, I don't really understand, just from reading the bare
2 record, why we accepted Ms. Willett. It just shows you that
3 something else was going on, besides the written word, that
4 made us feel like we could trust her as a fair juror.

03 : 45 5 Q. Based on the transcript, you're not sure why you selected
6 Ms. Willett?

7 A. That's right --

8 Q. You can't --

9 A. -- if you just read the written words in here.

03 : 46 10 Q. Okay. Did race play any part in your decision to strike
11 Ms. Holmes?

12 A. I don't believe it did, no.

13 Q. Would you be surprised if Mr. Henderson initially testified
14 that he did not know why you struck Ms. Holmes?

03 : 46 15 A. Would it surprise me?

16 Q. Yes.

17 A. No, sir.

18 Q. At the time of Ms. Holmes' examination, 11 jurors had been
19 seated and the prosecution had used 12 of it's peremptory
20 strikes; and Ms. Holmes was the 13th strike.

21 Did you strike Ms. Holmes because you were
22 opposed to seating a second Black juror after you had already
23 seated Ms. Lewis?

24 A. No.

03 : 46 25 Q. Two other Batson jurors, Marianne Walker and Mohamed Deen,

Gray Cross of Davenport

03 : 46 1 were also struck after Ms. Lewis was seated. Were those
2 strikes made because you were opposed to seating additional
3 jurors of color after you had seated Ms. Lewis?

4 A. No.

03 : 46 5 Q. Okay. I'd like to turn the discussion to Batson Juror
6 Mohamed Deen, whose materials are at Tab 17. Did you strike
7 Mr. Deen based on his responses to the first special issue?

8 A. Part of it.

9 Q. What was the other part of the reason you struck Mr. Deen?

03 : 47 10 A. (No response).

11 Q. What was the other reason that you struck Mr. Deen?

12 A. Well, you can see in my affidavit that Mr. Boyd tried to
13 rehabilitate him and he went back and forth. And it became
14 apparent to us -- or to me that he would make a good juror for
15 the defense, and so I struck him.

16 Q. With respect to Special Issue 1, was the problem that
17 Mr. Deen thought that the words "intentionally" and
18 "substantially" had the same meaning -- sorry --
19 "intentionally" and "substantially" had the same meaning as
20 "deliberately"?

21 A. No, I wouldn't say that.

22 Q. Was the problem that he thought that "intentionally" -- if
23 someone had done something intentionally, he was likely to find
24 that they also did it deliberately? Was that your concern?

03 : 48 25 A. No. My concern mainly was that he couldn't -- he couldn't

Gray Cross of Davenport

03 : 48 1 make up his mind which way he was going to go, and it was
2 obvious to me that Mr. Boyd wanted him. He only asked five
3 questions. That was very unusual for Mr. Boyd.

4 Q. Okay. Did you explain that reason in your affidavit you
03 : 48 5 submitted as direct testimony in this matter?

6 A. Yes, I did.

7 Q. Could you draw my attention to the place where you
8 explained that Mr. Boyd wanting Mr. Deen was the reason you
9 struck him?

03 : 48 10 A. It's on the second page of the affidavit.

11 Q. Okay. What about Mr. Boyd's questioning of Mohamed Deen
12 led you to think that he would be a good juror for the defense?
13 The number of questions he asked, and is there anything else?

14 A. None of those questions were even substantive.

03 : 49 15 Q. Okay. Was Mr. Deen's answers to the first special issue
16 any part of the reason that you struck him?

17 A. It may have been at the time, but I can't tell you that
18 now.

19 Q. Could you explain to me what your concerns were with
03 : 49 20 respect to the first special issue?

21 A. No.

22 Q. You don't have any recollection of what you were concerned
23 about with respect to the first special issue?

24 A. No, I really don't.

03 : 49 25 Q. You say in your affidavit that --

Gray Cross of Davenport

03:49 1 A. Well, but I put in the affidavit that he repeatedly said he
2 would always answer "yes" to it.

3 Q. Could you point to me where you say that he would
4 repeatedly always answer "yes"?

03:50 5 A. Right under his name, the first sentence.

6 Q. Right. Okay. Why was that a concern for the prosecution,
7 that he was likely to answer the first special issue "yes"?

8 A. Means he couldn't be a fair juror.

9 Q. Okay. Did you raise that concern with the judge?

03:50 10 A. No. Why would I raise it with the judge?

11 Q. Did you move to strike Mr. Deen for cause?

12 A. Yes, we did. I believe we did.

13 Q. What was the judge's decision on that?

14 A. Well, I believe Mr. Boyd rehabilitated him with a series of
03:50 15 questions.

16 Q. Okay. Did you want Mr. Deen to answer "no" to the first
17 special issue? Would that be favorable to the prosecution if
18 he was inclined to -- if he answered "no" to the first special
19 issue?

03:50 20 A. If he answers "no" always or "yes" always, he's not a fair
21 juror.

22 Q. Understood. And you raised that concern with the judge,
23 and how did the judge decide that concern?

24 A. I'm not following you.

03:51 25 Q. Did the judge -- how did the judge rule on your motion to

Gray Cross of Davenport

03 : 51 1 strike him for cause?

2 A. Well, after Mr. Boyd rehabilitated him, she denied the
3 cause.

4 Q. So, she believed that he was an acceptable juror?

03 : 51 5 A. He made the right answer, yes.

6 Q. And my question is, from the perspective of the
7 prosecution, if the judge believes that he's an acceptable
8 juror, why would you want to exclude a juror who was likely to
9 answer the first special issue "yes"?

03 : 51 10 A. Because we didn't have to agree with the judge on her
11 opinion. That didn't necessarily mean -- mean she thought he
12 was a good potential juror. It means he answered the question
13 correctly.

14 Q. As a matter of trial strategy, would -- were you looking
03 : 51 15 for jurors to answer special issues "yes" or "no"; which result
16 were you looking for?

17 A. Well, the result we wanted was "yes."

18 Q. Correct. And the factor that we're discussing would have
19 inclined Mr. Deen to answer the first special issue "yes." Is
20 that correct?

21 A. That's right.

22 Q. Okay. Why was that a problem for the State?

23 A. Because it means he wouldn't be a fair juror.

24 Q. But the judge had already decided that when she -- or
03 : 52 25 voiced that when she said he could be a fair juror.

Gray Cross of Davenport

03 : 52 1 A. After he was rehabilitated, yes.

2 Q. At that point why would the State not want to have a juror

3 who was inclined to answer "yes" to the first special issue,

4 according to his understanding of the words "intentionally" and

03 : 52 5 "deliberately"?

6 A. Well, after we had moved for cause to strike him and after

7 Mr. Boyd asked him five non-substantive questions when it was

8 his turn to question him, we did not think he was a good juror

9 for us and it was obvious to us that Mr. Boyd thought he was a

03 : 52 10 good juror for him.

11 Q. Did you always exercise peremptory strikes against jurors

12 who you had moved to strike for cause?

13 A. No.

14 Q. What was different about the motion to strike for cause in

03 : 52 15 Mr. Deen's case --

16 A. I don't remember. I couldn't tell you.

17 Q. -- from the other cases?

18 A. I couldn't tell you.

19 Q. Could we please turn to Tab 16, where there is the juror

03 : 53 20 materials for Joyce Wojdyla. If you'd please turn to Page 456,

21 Line 19.

22 A. Four fifty-six?

23 Q. Yes, ma'am. Line 19, Ms. Wojdyla was asked, "And can you

24 conceive there might be a situation where Special Issue

03 : 53 25 Number 1 could be answered 'no' even though you found that he

Gray Cross of Davenport

03 : 53 1 had done -- he, the defendant, had done an act intentionally?"

2 And she responds, "I don't think so."

3 The next question, "Okay, now. I'm not asking
4 you to come up with any type of situation, but would you agree
5 with me that there may be such a situation or could be such a
6 situation?"

7 Answer, "Well, there probably could be, only
8 because I know there's got to be a gray area -- gray area. But
9 just, you know, from my experience, as limited as they are, I
03 : 54 10 wouldn't say so."

11 Why was Ms. Wojdyla's answer acceptable to the
12 State?

13 A. I don't know, unless it's because she's not -- she's not
14 absolutely convinced of it. She said she can't think of one,
03 : 54 15 there could be one, there's a gray area.

16 Q. Is your understanding that her view on Special Issue 1
17 differs from Mr. Deen's issue on Special 1 [sic] after he was
18 questioned by Mr. Boyd?

19 Do you see a distinction between the way those
03 : 54 20 two potential jurors saw Special Issue 1?

21 A. I don't really know. I don't think she ever came out and
22 said exactly what she would do.

23 Q. Line 23, she says, "I don't think so."

24 A. And then there's another question; and she said, "There
03 : 55 25 probably could be."

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03:55 1 Q. Right. And she concludes, "Based on my limited experience,
2 I would say -- I wouldn't say so. I would not say so."

3 Okay. I'd like, please, now to turn to Exhibit
4, Tab 2.

03:55 5 A. Exhibit 4?

6 Q. Which is back to the transcript of the Tompkins Batson
7 hearing. Starting on Page 96 --

8 A. Just a minute. Just a minute.

9 Q. Takes me awhile to get there, too.

03:55 10 A. Four, two.

11 Okay. Then where?

12 Q. Page 96, starting at Line 7.

13 Okay. This passage, Mr. Royce is discussing a
14 struck Black potential juror by the name of Ms. Sutphen. And
03:56 15 Attorney Jones is reading from Mr. Royce's examination of
16 Ms. Sutphen.

17 MS. MIRANDA: Your Honor, I know he hasn't asked this
18 question yet; but I do want to object. I'm not sure what
19 someone else's questioning of a juror in another case --

03:56 20 THE COURT: Well, I don't think that I can rule unless
21 I hear what the question is yet, right? It might be a relevant
22 question.

23 MR. GRAY: May I read the passage into the record
24 before I ask my question?

03:56 25 THE COURT: Pardon me?

Gray Cross of Davenport

03 : 56 1 MR. GRAY: May I --

2 THE COURT: Well, I mean, if it relates to the
3 question that you're going to ask, sure.

4 MR. GRAY: Yes. Thank you.

03 : 56 5 BY MR. GRAY:

6 Q. All right. So, Attorney Jones asks -- reads, "The Court is
7 not going to give you any definition. You are saying that in
8 every case that you found someone guilty of capital murder you
9 would automatically answer Question Number 1, 'Yes.' "

03 : 57 10 Mr. Royce responds, "Okay. She did say that."

11 And then Mr. Jones asks, "Okay. And from the
12 point of view as having a death qualified juror, absent any
13 additional explanation, as a tactical matter, would you say
14 that a juror was more prone, at least in response of that sort,
03 : 57 15 [sic] to favor the State?"

16 Mr. Royce responds, "If you ask that question by
17 itself, with no history behind it, the question at all, yes."

18 Mr. Jones says, "Okay."

19 And Mr. Royce continues his answer, "But in this
20 case, this time, that question was asked to strike her for
21 cause because I did not want her and I did not want to use any
22 of my strikes against her at that time. I had made up my mind
23 from the very beginning I did not want her."

24 My question is, Mr. Royce admitted -- did

03 : 57 25 Mr. Royce admit that he was using the question concerning

Gray Cross of Davenport

03 : 57 1 Special Issue 1 to generate a cause strike because he did not
2 want the juror?

3 MS. MIRANDA: Objection, your Honor. I don't know how
4 that's relevant to this case.

03 : 58 5 THE COURT: And it calls for complete and total
6 speculation. Objection sustained.

7 MR. GRAY: Okay. May I move on to another topic, your
8 Honor?

9 THE COURT: Yeah. But ask her about what she did.
03 : 58 10 How about that?

11 BY MR. GRAY:

12 Q. Did Mr. Royce's description of what happened here, is it
13 the same question that you were -- same decision that you were
14 making with respect to Mr. Deen?

03 : 58 15 MS. MIRANDA: Your Honor, again, I'm going to object
16 as to the form of that question. I think if you want --

17 THE COURT: Objection sustained.

18 BY MR. GRAY:

19 Q. Ms. Davenport, were you using Special Issue Number 1 as a
03 : 58 20 pretext to strike Potential Juror Deen?

21 A. No.

22 Q. Okay. I'd like to turn to Potential Juror Alicia Taylor,
23 whose materials are at Tab 22 of the first volume.

24 Please turn your attention to the notes at the
03 : 59 25 bottom of the page on Ms. Taylor's juror questionnaire.

Gray Cross of Davenport

03:59

1 A. Okay.

2 Q. You note if -- in reference to the two special issues, "If
3 they should be 'yes,' she can't see herself answering 'no,'
4 said she wouldn't answer 'no.' "03:59 5 Is that a favorable answer from the point of
6 view -- from your point of view?

7 A. Yes.

8 Q. Okay. You noted on Ms. Taylor's questionnaire that she
9 could feel it if the proper case came up.04:00 10 Please turn your attention to the "Capital
11 Punishment Attitude Questionnaire." Your notation says, "What
12 kind? Could feel it if proper case came up." Why did you note
13 that statement?

14 A. Apparently she -- that's what she said.

04:00 15 Q. Did you think that was a good answer?

16 A. That she could feel what kind of case that she would not
17 vote for the death penalty? No.18 Q. That she would vote for the death penalty in a proper case,
19 if she could feel it?04:00 20 A. "There are some kinds of cases in which I know I could not
21 vote for the death penalty even if the law allowed me to but
22 others in which I would be willing to consider voting for it."

23 Not really, no, not particularly good.

24 Q. Excuse me. Was that a favorable answer or not favorable
04:01 25 answer, that she could feel it if the proper case came up?

Gray Cross of Davenport

04 : 01 1 A. I don't know that it's either. It's kind of neutral.

2 Q. Okay. The judge, after the answer -- after receiving that
3 answer, described it as a good answer. If you -- would you
4 disagree with Judge Kegans that that was a good answer?

04 : 01 5 A. I wouldn't call it a good answer.

6 Q. Mr. Henderson, after receiving that answer, described it as
7 a good answer at Page 106, Line 7. Do you have a different
8 view from Mr. Henderson as to whether that's a favorable answer
9 or not?

04 : 01 10 A. I wouldn't call it a good answer, no.

11 Q. Do you doubt that Ms. Taylor supported capital punishment?

12 A. She says she's in favor of capital punishment.

13 Q. Did you question whether she was willing to give a death
14 verdict in an appropriate case?

04 : 02 15 A. I don't know.

16 Q. I'm sorry. I didn't hear your answer.

17 A. I don't know.

18 Q. You don't know whether or not you would question whether
19 she would give a death verdict in an appropriate case?

04 : 02 20 A. I don't -- I don't remember.

21 Q. Okay. Were you concerned that she might not answer the
22 first special issue "yes" in an appropriate case?

23 A. I don't really remember what I thought about her.

24 Q. Okay. Could we please turn to Tab 22, Page 110?

04 : 03 25 Mr. Henderson asked -- see the line, "Can you

Gray Cross of Davenport

04:03 1 tell me if your belief with regard to the death penalty comes
2 from any religious belief that you might have or is it a moral
3 belief?"

4 And she answers, "I think it is a moral belief.
04:03 5 It's a moral belief. It's hard to see why someone killing
6 another individual and I can't" --

7 *(Video screen goes blank.)*

8 THE COURT: Oh, stop. What happened here? Where is
9 my guy?

04:03 10 Oops. Give me one second. Let me find my
11 technical folks.

12 Lawyers, while we're waiting, we're clearly not
13 going to finish today. I'm good for first thing in the
14 morning. Is everybody still good for first thing in the
04:04 15 morning?

16 MS. SWARNS: Yes.

17 THE COURT: Everybody?

18 MS. MIRANDA: Yes.

19 THE COURT: Okay. Good.

04:05 20 *(Sotto voce discussion between Court and staff)*

21 THE COURT: All right. We've got you back online.
22 Can you see us again, Mr. Rosales?

23 MR. ROSALES: Yes, your Honor. Yes.

24 THE COURT: Okay. Sorry about that. We stopped the
04:06 25 proceedings when we realized that we had lost the connection

Gray Cross of Davenport

04:07 1 with you; so, you have not missed anything.

2 MR. ROSALES: All right. Thank you. Thank you.

3 THE COURT: All right. Do you remember where you
4 were? I think you were on Page --

04:07 5 MR. GRAY: Page 110, your Honor.

6 THE COURT: -- 110.

7 MR. GRAY: Yes. Okay. We were discussing that
8 Ms. Davenport doesn't recall whether she doubted -- whether or
9 not she doubted Ms. Taylor's willingness to impose the death
04:07 10 sentence in a proper case.

11 THE COURT: Right.

12 BY MR. GRAY:

13 Q. And in response to that, we were looking at the passage
14 that starts on Line 3, where Ms. Taylor is asked, "Your feeling
04:07 15 with regard to the death penalty, I suppose, is justified in
16 your mind in some way. Can you tell me if your belief with
17 regard to the death penalty comes from any religious belief you
18 might have or is it a moral belief?

19 Ms. Taylor responds, "I think it is more of a
20 moral belief. It's a moral belief. It's hard for me to see
21 someone killing another individual, and I can't for any
22 particular -- and I can't say for any particular reason. There
23 may be reasons; but still, I don't think it's reason enough to
24 take another person's life and then just get away with it scot
25 free. They may go to prison; but, to me, sometimes that's not

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04:08 1 enough. To me, it is a deterrent to crime. If you know if you
2 commit a crime all you're going to do is go to prison, it's
3 going to be -- I don't mean a lost cause, but I see it as the
4 ultimate deterrent to crime at this point in time."

04:08 5 And then she's asked, "Have you held these
6 beliefs for a very long time?"

7 And she answers, "Yeah."

8 Is there anything in these statements that casts
9 doubt on Ms. Taylor's support for capital punishment?

04:08 10 A. Not particularly, no.

11 Q. Is there anything that suggests she might be unwilling to
12 impose the death verdict in an appropriate case?

13 A. Not in that exchange, no, on that question.

14 Q. In your affidavit, you also wrote that Ms. Taylor had
04:08 15 trouble understanding "beyond a reasonable doubt." Was
16 Ms. Taylor's testimony about the burden of proof one of the
17 reasons you exercised a strike against her?

18 A. It's one of the reasons, yes.

19 Q. Okay. If we could, please, turn to Page 117 at Tab 22.
04:09 20 And at the top of that page -- yes. Okay.

21 Mr. Henderson asks, "Okay. Well, I'm not
22 understanding, then. Would you agree with me that the burden
23 is not 'beyond any or all doubt' or the legislature could have
24 put it in there?"

25 She answers, "I think it's fair of them to say

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04:09 1 'beyond a reasonable doubt.' "

2 Mr. Henderson asks, "Okay. So, it would seem
3 fair to you that a person could be found guilty and receive the
4 death penalty based upon evidence beyond a reasonable doubt as
5 opposed to evidence beyond all doubt or any doubt?"

6 And Ms. Taylor's responds, "Exactly."

7 "You think that's fair?"

8 "Yes."

9 Is this an acceptable answer to the State on
04:10 10 "beyond a reasonable doubt"?

11 A. It was. But that's not what she said the first time she
12 was asked.

13 Q. Well, is it your practice to strike jurors who gave
14 equivocal answers or answers that made you uncomfortable and
04:10 15 then gave a firm answer that was favorable to the State?

16 A. It depends on all the other circumstances involving that
17 person, the things we could see and hear and feel in the
18 courtroom.

19 THE COURT: I'm sorry. Do you know is there -- oh,
04:10 20 it's back again. Sorry.

21 MR. GRAY: Can you hear us, Mr. Rosales?

22 MR. ROSALES: No.

23 THE COURT: You cannot hear us?

24 MR. ROSALES: Yeah, I hear -- now I can hear you.

04:10 25 THE COURT: Okay. Great.

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0 4 : 1 0 1 Speak up a little bit.

2 MR. GRAY: Can you hear me, sir?

3 THE COURT: Did you just hear your lawyer?

4 MR. ROSALES: What?

0 4 : 1 0 5 MR. GRAY: Could you hear me, sir?

6 MR. ROSALES: Just barely. I can't hear that good.

7 MR. GRAY: Okay.

8 THE COURT: Not that good?

9 Okay. Speak up for him. I'm sorry, Mr. Gray.

0 4 : 1 1 10 BY MR. GRAY:

11 Q. Could you please turn to Tab 14?

12 This is Accepted Juror Beverly Willett. And

13 please turn your attention to Page 276.

14 We could start, please, at Line 8. Ms. Willett

0 4 : 1 1 15 is asked, "Okay. And would you have to be convinced beyond all

16 doubt in a case involving the death penalty?"

17 Response, "I believe so. I believe that's the

18 law."

19 The Court interrupts, "No. The law says 'beyond

0 4 : 1 1 20 a reasonable doubt.' The law does not say 'beyond all doubt.'

21 Well, beyond" --

22 And then you ask, "Now, if you disagree with the

23 law in this area, that's fine. You certainly have a right to

24 do that. Do you think it's fair that a person facing a death

0 4 : 1 2 25 penalty, when the State has only proved the case beyond a

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04:12 1 reasonable doubt instead of beyond all doubt" --

2 Response, "No. I think if I had any qualms at
3 all, I couldn't, you know. If I was on the jury and we did not
4 find the defendant -- and we did find the defendant guilty but
5 there was any doubt, you know, possible doubt, then, no, I
6 could not say, 'Yes, take his life.'"

7 Why was this juror acceptable to the State?

8 A. I have no idea. I told you earlier that I -- when I read
9 through her complete questioning, she didn't give the right
04:12 10 answers to -- to almost anything.

11 I have no idea why we accepted her, unless it was
12 what is contained in the courtroom that I've tried to explain
13 to you, the way she said it, the way she looked, the way she
14 acted, what our gut feeling was about her.

04:12 15 Q. So, you would agree with me -- I'm sorry.

16 Did you finish?

17 A. I agree with you that from reading the words she does not
18 sound like a good State's juror.

19 Q. Would you agree with me that Ms. Taylor's answer on "beyond
04:13 20 a reasonable doubt" was substantially more favorable to the
21 State --

22 A. Yes, once she finally --

23 Q. -- than Ms. Willett's?

24 A. Once she finally got it right, yes.

04:13 25 Q. Okay. You noted that -- the fact that the defendant killed

Gray Cross of Davenport

04:13 1 more than one person wouldn't help on future dangerousness.

2 We're again talking about Ms. Taylor here.

3 Why wouldn't the State want a juror who could
4 find future dangerousness based on a single killing?

04:13 5 A. Well, we would.

6 Q. So, was Ms. Taylor's view that she could find future
7 dangerousness on the basis of a single killing favorable to the
8 State in this instance?

9 A. Well, I don't know where you're reading exactly; but I
04:14 10 would think so, yes.

11 Q. If you could turn to Tab 22, please, the notes on -- it's
12 also in your affidavit.

13 THE COURT: Pardon me?

14 BY MR. GRAY:

04:14 15 Q. Okay. It's on her questionnaire; but it's also,
16 Ms. Davenport, at the bottom of the page of -- 3 of your
17 affidavit.

18 "As to future dangerousness, the fact that the
19 defendant killed more than person -- one person wouldn't help
04:14 20 her?"

21 Answer, "Yes."

22 A. Under Ms. Taylor?

23 Q. Yes.

24 THE COURT: Page --

04:14 25 A. Oh, okay.

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0 4 : 1 4 1 THE COURT: Got it.

2 A. Well, I would want her to answer -- to answer "yes" to that
3 question.

4 BY MR. GRAY:

0 4 : 1 4 5 Q. Why did you want her to answer "yes" to that question?

6 A. Because there were more than one person killed in this --
7 in this crime.

8 Q. Okay. Would an answer that she was going to find future
9 dangerousness on the basis of a single killing disqualify her?

0 4 : 1 5 10 A. No. But I don't know that she did that.

11 Q. Okay. Could you please turn to Tab 15?

12 A. Fifteen?

13 Q. Yes, ma'am, 15, Page 22. And we're again talking about
14 Ms. Williamson. Line 22.

0 4 : 1 5 15 A. I'm sorry. Who are we talking about? Ms. Williamson?

16 Q. Ms. Williamson. The question begins on Line 18.

17 "Would it make any difference to you" --

18 MS. MIRANDA: I'm sorry. What page are you on? I
19 missed that.

0 4 : 1 5 20 MR. GRAY: Excuse me. Page 22 behind Tab 15.

21 THE COURT: Tab 15? Okay.

22 BY MR. GRAY:

23 Q. "Would it make any difference to you that more than one
24 person may have been killed, as to whether or not you would be
0 4 : 1 6 25 more in favor of capital punishment or less?"

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1 || Answer, "No."

Was that an acceptable answer for the State?

3 A. Well, obviously, it was, at least taken in -- in total of
4 all the said -- of the circumstances involving this woman,
5 because I believe she was on the jury.

6 Q. Okay. Why was this an acceptable answer and Ms. Taylor's
7 answer not acceptable?

8 A. Well, there continued on more questions about that.

9 || Perhaps that was it.

10 Q. Ms. Taylor also testified that the fact that a child had
11 been killed would matter to her on the future -- future
12 dangerousness. Would that be relevant to the State's
13 assessment. --

14 A. Yes.

15 O. -- of whether she would be a favorable juror on this issue?

16 || A. Yes.

17 || Q. Would that be a favorable characteristic?

18 A. Yes.

19 Q. And just to your recollection, was there a pregnant woman
20 involved in --

21 A. There was a young pregnant girl, yes.

22 Q. Okay. Is an educated juror good for the prosecution?

23 || A. Usually, yes.

24 Q. Okay. You noted on Ms. Taylor's juror questionnaire,
25 "Educated Black female, articulate, but not totally."

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04:17 1 Do you recall why you noted that she was
2 educated, what characteristic she had indicated to you that she
3 was educated?

4 A. No. It must be on here somewhere.

04:17 5 Q. Please turn to Tab 22.

6 A. But I don't know where.

7 It says she graduated from Ohio State University.

8 Q. In 1981.

9 Do you recall why you wrote, "Articulate, but not
04:18 10 totally"? What was the reason for writing that comment?

11 A. I must have changed my mind after I wrote part of it.

12 Q. Okay. Do you recall what part of her testimony made you
13 believe that she was not totally articulate?

14 A. No. And I further wrote that it got worse as she went
04:18 15 along with Keno during the questioning.

16 Q. Do you recall what part of her testimony caused you to
17 write that?

18 A. No.

19 Q. All right. I would like to turn to juror -- Potential
04:18 20 Juror Marianne Walker, at Tab 24. Ms. Walker had a Master's in
21 educational administration from the University of California.
22 She's a member of the League of Women Voters; is on two church
23 committees, hospitality and new members; and she has been a
24 school teacher for 16 years. She also testified that she
04:18 25 taught second grade.

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04:18 1 Do any of those characteristics suggest that she
2 might be a good juror for the prosecution?

3 A. Yes, they do. Her answers looked -- looked acceptable as
4 they are written in the written form; but, obviously, there was
04:19 5 some reason we didn't feel comfortable with her. I think that
6 she was even struck before Mr. Boyd began questioning.

7 Q. Do you recall the reason that you struck her before
8 Mr. Boyd began questioning?

9 A. Not -- unless we already had made up our minds and didn't
04:19 10 want to waste the time.

11 Q. All right. In your affidavit you say that one reason that
12 you struck Ms. Walker was that she's a teacher and teachers are
13 naturally sympathetic, make good jurors for the defense. What
14 do you mean by "naturally sympathetic"?

04:19 15 A. I think I explained to you before that my parents were both
16 teachers.

17 Q. Yes, ma'am.

18 A. So, that's who I grew up with. And they just -- they just
19 are.

04:20 20 Q. Okay.

21 A. In my viewpoint.

22 Q. You accepted Jacklynn Lyles, who is a school teacher. Do
23 you recall why you allowed Ms. Lyles to be seated but not
24 Ms. Walker?

04:20 25 A. No, I don't.

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04:20

1 Q. Okay.

2 A. She was the one who was then excused when she didn't want
3 to serve?

4 Q. For medical reasons.

04:20 5 A. Okay.

6 Q. That's correct.

7 Ms. Lyles taught at the Katy Independent School
8 District for five years. She taught sixth grade English, and
9 she had an education certificate and a Bachelor of Fine Arts
04:20 10 from Abilene Christian University.

11 Ms. Walker's -- would you agree that Ms. Walker's
12 Master's degree was a more advanced degree than Ms. Lyles'?

13 A. Yes.

14 Q. Was there a difference, in your mind, between a second
04:20 15 grade teacher and a sixth grade teacher?

16 A. I don't remember. Probably not.

17 Q. All right. Is there anything that you could point to in
18 Ms. Walker's voir dire testimony that suggests that she's, in
19 fact, naturally sympathetic?

04:21 20 A. Not in particular, no.

21 Q. You also state that you struck Ms. Walker because her
22 stance on premeditation bothered you. Is that correct, that
23 that's a reason that you exercised a peremptory strike against
24 Ms. Walker?

04:21 25 A. I wrote that her stance on the issue of premeditation

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04 : 21

1 bothered me.

2

Q. Yes, ma'am. Is that a -- is that a reason that you struck
3 her?

4

04 : 21

A. I don't know the total reason why we struck her. It must
5 have been all these things together. And it may have been the
6 way she looked at us. I don't know. I don't know what the
7 vibes were in the courtroom.

8

9

04 : 21

Q. Well, that was the reason you stated in your affidavit that
you struck her.

10

11

A. I told you everything that was in my affidavit was
everything I could think of when I wrote it.

12

13

14

04 : 22

Q. Okay. And is that based on a refreshed recollection, based
on usual practices, what you usually do in the practice of voir
dire?

15

16

17

18

04 : 22

A. Yes. The items on the first page are, yes.

19

20

Q. Are you saying that you're not sure that the reason that
you struck Ms. Walker was that her stance on premeditation
bothered you?

21

22

23

24

04 : 22

A. I'm telling you that this was 23 years ago and I can't tell
you for certainty what all my reasons were for any of them.

25

Q. Do you recall -- when you wrote that in your affidavit, do
you recall what you meant by "her stance on premeditation
bothered you"?

26

27

04 : 22

A. Well, it bothered me when I read through the questions and
answers.

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04:22 1 Q. Okay. Can you point us towards what in her questions and
2 answers caused you concern?

3 A. Do we have it here?

4 MS. MIRANDA: I think it's probably --

04:23 5 A. Do you know what page it's on where we talked about that?

6 BY MR. GRAY:

7 Q. Well, I can point you towards one place where she talks
8 about premeditation. I would actually first point you to her
9 capital punishment attitude survey, which is the last page
04:23 10 before the blue sheet.

11 And if you look at Item 23 on that page, the
12 first column is "Agreed" and the second column is "Disagreed."

13 A. Okay.

14 Q. And she made a checkmark under the "Disagreed" column for
04:23 15 the statement, "Capital punishment is justified only for
16 premeditated murder."

17 Does that cause you concern?

18 A. No.

19 Q. And if we could, turn to Page 515 of her transcript. And
04:23 20 on Line 9 she says, "I think I'd be leaning towards accepting
21 the maximum penalty if I was aware of the circumstances, the
22 circumstances tended to prove that there was some type of
23 malicious forethought."

24 And Mr. Henderson interjects, "Okay. You're
04:24 25 talking perhaps about premeditation?"

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04:24 1 And she responds, "Yes, uh-huh."

2 Would you agree that the word "premeditation" was
3 Mr. Henderson's not yours, not your own?

4 A. Would I --

04:24 5 Q. I'm sorry. Not "Mr. Henderson's." Not the juror's.

6 A. He's the first one to say "premeditation."

7 Q. Right.

8 A. He said, "Are you talking about premeditation?"

9 And she said, "Yes."

04:24 10 Q. Right. Would you agree that the word "premeditation" was
11 Mr. Henderson's word, not the prospective juror's word?

12 A. Yes.

13 Q. Okay. If you could, please turn to Page 517, Line 7.

14 There's a -- there's a discussion about -- where the Court
04:25 15 interjects there, says, "That's not the capital murder
16 situation."

17 And then she says, "Okay. Well, I'm trying to
18 follow your line of reasoning. I would not have any" --

19 And Mr. Henderson says, "Requirement of that, any
04:25 20 premeditation?"

21 And she agrees, "Right."

22 I guess, in fairness, we should start on the
23 answer that's above that, where she says, Line 1, "No, that
24 wouldn't be necessary. I have heard of situations where
04:25 25 persons were killed or seriously injured because of

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04 : 25 1 carelessness and they weren't necessarily aiming the gun at
2 them."

3 And that's the point where the Court explains
4 that might not be capital murder, and then she agrees with
04 : 25 5 Mr. Henderson that she wouldn't have any requirement of
6 premeditation.

7 Does that answer -- resolve any concern you might
8 have about whether Ms. Taylor would require premeditation in a
9 capital case?

04 : 26 10 A. No. It just took two and a half pages to get there.

11 Q. But you were satisfied with her statement, which is
12 consistent with what she said on her checkmarked questionnaire,
13 that she wouldn't require premeditation?

14 A. Yes.

04 : 26 15 Q. Do you know whether any seated White jurors indicated on
16 their capital punishment attitude surveys that premeditation
17 would be required for capital punishment?

18 A. I couldn't tell you.

19 Q. Okay. In your experience, do non-lawyers understand the
04 : 26 20 difference between "intentional" and "premeditated" before it's
21 explained to them? Is that something that a lot of people
22 generally understood?

23 A. A lot of them don't understand.

24 Q. So, in your experience, in voir dire was it frequently
04 : 27 25 necessary to explain the difference between intentional actions

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04:27 1 and premeditated actions so that laypeople could understand it?

2 A. I don't think they were confusing "premeditated" and
3 "intentional" with each other, but those two terms both were
4 always -- always explained.

04:27 5 Q. When you're interviewing potential jurors, is confusion
6 about complicated legal concepts that laypeople don't
7 understand typically a concern of yours? Is that something
8 that would cause you to exercise a strike against a juror?

9 A. That it has to be explained? No.

04:27 10 Q. Yes.

11 A. No.

12 Q. All right. Would you agree that Ms. Walker was a very
13 strong supporter of the death penalty?

14 A. I really don't remember, but she probably was. She -- she
04:28 15 looks like a very good State's juror, on paper.

16 Q. Okay. Is there anything that you could point to that would
17 cause you to be concerned about her support of the death
18 penalty?

19 A. No, sir.

04:28 20 Q. You said that Ms. Walker had trouble answering questions
21 regarding the second special issue. Do you recall what you
22 mean by that statement?

23 It's on Page 4 of your affidavit.

24 A. About the "intentional" versus "deliberately"; is that what
04:29 25 you asked?

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04:29 1 Q. Well, I'm asking, if you look at Page 4 --

2 A. Oh, of my --

3 Q. -- of your affidavit --

4 A. Okay.

04:29 5 Q. -- you said she had trouble -- it's the second sentence of
6 the second paragraph, "She also had trouble answering questions
7 regarding Special Issue Number 2."

8 A. Okay.

9 Q. Do you recall what you meant by that statement?

04:29 10 A. I don't know, unless it was things had to be explained to
11 her or cleared up by the Court.

12 I don't remember. I didn't quote it.

13 Q. Okay. When she was asked whether she would always answer
14 Special Issue Number 2 "no," she said, "It would depend on what
04:30 15 the State would show me."

16 Is that an acceptable answer?

17 If you need a record citation, it's Page 527,
18 Lines 19 through 20.

19 A. It's probably all right, yes.

04:30 20 Q. Okay. She said that she could answer the second special
21 issue based on the facts of the crime alone. Is that an
22 acceptable answer?

23 A. Yes, it is.

24 Q. And she said that in a capital felony murder case she would
04:30 25 tend to answer the second special issue "yes." Is that an

Gray Cross of Davenport

04:30 1 acceptable answer?

2 A. Yes.

3 Q. Okay. I'd like to move on to your statement that you
4 struck Ms. Walker because her answer to Mr. Henderson's
04:30 5 question concerning an innocent pregnant victim -- could you
6 please turn to Tab 24 --

7 A. Okay.

8 Q. -- Line -- I'm sorry. We're at Tab 24, Page 513. And at
9 Line 17, Mr. Henderson asks -- well, first of all, is that a
04:31 10 reason that you struck Ms. Walker? Do you recall whether the
11 answers to the questions concerning an innocent pregnant woman
12 were one of the reasons you struck Ms. Walker?

13 A. I don't know.

14 Q. You don't know. Okay.

04:31 15 It says on your affidavit that that's one of the
16 reasons.

17 A. It says on my affidavit that I was uncomfortable with that
18 answer. And it means I'm uncomfortable with that answer as I
19 read through this. I don't remember what my feeling was at the
04:31 20 time, 23 years ago.

21 Q. Okay. So, you're not sure whether that was the reason 23
22 years ago that you struck Ms. Walker?

23 A. No, I don't remember 23 years ago all my feelings on each
24 one, no.

04:32 25 Q. When you read that section of the transcript today, is

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04 : 32 1 there something about it that you can point to that makes you
2 think that, based on your usual practices, this would have been
3 unacceptable and you would have said, "We've got to exercise a
4 peremptory strike against this potential juror"?

04 : 32 5 A. And you're talking about Line 17?

6 Q. Well, I'm talking about what starts at Line 17 and
7 continues to the following page. I'll give you a minute to
8 read it if you like.

9 A. Okay.

04 : 32 10 She was having trouble with the word "innocent."
11 She thought if you had -- you had to have intent to kill that
12 person and if somebody else was killed, she couldn't quite put
13 that all together.

14 Q. Is it correct that she asked Mr. Henderson to clarify the
04 : 32 15 question because she couldn't understand it?

16 A. Apparently.

17 Q. Did he ever do so?

18 Let me direct your attention, please, to Page
19 514, Line 13, where she asked, "So, would you rephrase your
04 : 33 20 question, please?"

21 And Mr. Henderson responds, "Let me just ask you
22 another one."

23 A. Right.

24 Q. Was any misunderstanding that -- that she may have had
04 : 33 25 about the doctrine of transferred intent or what an innocent

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04:33 1 pregnant victim might mean clarified for her? Was she allowed
2 an opportunity to answer that question?

3 A. I don't know if it was clarified for her or not.

4 Q. Okay. I'd like to turn to Tab 20, which contains the juror
5 information about -- for Esmerelda Lopez.

6 THE COURT: Which one, now, please?

7 MR. GRAY: Tab 20, your Honor. This is Esmerelda
8 Lopez.

9 THE COURT: Okay.

04:34 10 BY MR. GRAY:

11 Q. Would you agree with me that Ms. Lopez strongly supported
12 capital punishment?

13 A. That's what she indicated on her attitude questionnaire.

14 Q. Okay. Ms. Lopez was the victim of a robbery. Three men
04:34 15 had held a gun to her head while she was working at a liquor
16 store.

17 Would you consider a crime victim to be
18 potentially a good juror for the prosecution?

19 A. In and of itself, yes.

04:34 20 Q. You state in your affidavit that you struck Ms. Lopez
21 because she had conflicting written answers on her "Capital
22 Punishment Attitude Questionnaire." Is that a reason that you
23 struck Ms. Lopez?

24 A. It could have been a contributing reason, yes.

04:35 25 Q. Okay. Do you recall what you meant by that?

Gray Cross of Davenport

04:35 1 A. Well, evidently, some of them conflicted with each other.
2 And I listed the numbers.

04:35 3 Q. Right. You listed 5, her answer that we've been
4 discussing, that she strongly favored capital punishment as an
5 appropriate penalty, and, then, four other responses on the
6 scale, 2 --

7 A. On the next page, yes, she said, "Capital punishment is
8 absolutely never justified. I don't believe in capital
9 punishment, but I'm not sure it isn't necessary."

04:35 10 She checked, "yes," "We must have capital
11 punishment for some crimes." And she checked that, "Capital
12 punishment is just and necessary."

13 So, you know, those conflict with each other.

14 Q. Would you agree with me that 5 is consistent with --
04:36 15 certainly consistent with 10 and 17?

16 A. That, "Capital punishment cannot be regarded as a sane
17 method for dealing with crime"?

18 Q. No. "We must have capital punishment for some crimes" and
19 "capital punishment is just and necessary"?

04:36 20 A. I'm sorry. I'm not following you. Say that again.

21 Q. Okay. Well, my understanding --

22 A. Oh, 5 on the page before?

23 Q. Yes, 5 --

24 A. Okay.

04:36 25 Q. -- on the survey --

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04:36 1 A. Okay.

2 Q. -- and 10 and 17 on the scale.

3 A. Yes. Yes.

4 Q. And would you agree with me that 9, "I don't believe in
04:36 5 capital punishment, but I'm not sure it isn't necessary," is
6 not inconsistent with any of the other responses that we've
7 been discussing?

8 A. Well, it said she -- it says, "I don't believe in capital
9 punishment"; and I think that is inconsistent.

04:37 10 Q. But she suggests that it might be necessary?

11 A. Yes.

12 Q. Okay. So, the inconsistency that we're talking about is
13 that she checked Number 2, "Capital punishment is absolutely
14 never justified"?

04:37 15 A. Yeah, 2 and 9 just don't agree with 10 and 17.

16 Q. Okay. You're -- do you agree with me that Number 9 is
17 potentially consistent with 5, 10, and 17?

18 A. No, not particularly.

19 Q. Okay. Ms. Lopez also agreed with the following statements
04:37 20 supporting capital punishment. "We must have capital
21 punishment for some crimes," "Capital punishment is just and
22 necessary," "Capital punishment should be used more often than
23 it is." That's 24. Would you agree with me that her response
24 on 24 is a favorable answer for the State?

04:37 25 A. Yes.

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04:37 1 Q. Turning to Ms. Lopez' testimony, please turn to Page 19,
2 Line 13.

3 Mr. Henderson asks, "I'm going to ask you about
4 some of the questions with regard to your answers here. On the
04:38 5 sheet, you said to the question, 'Capital punishment is
6 absolutely never justified,' you have agreed with that. Since
7 there are so many questions here and you've already gone
8 through so many, I guess it might be a little confusing. But
9 probably would you say that capital punishment is justified in
04:38 10 some cases?"

11 Answer, "In some, not in all."

12 Does that question clarify why -- that Ms. Lopez
13 may have checked Number 2 by accident?

14 A. Well, it doesn't explain why she would have checked
04:38 15 anything by accident. It explains what she's saying right
16 here.

17 Q. Does it clarify Ms. Lopez' view on whether capital
18 punishment is justified?

19 A. It says what it says, "In some, but not in all."

04:39 20 Q. All right. Is it normally your practice to give in-court
21 testimony weight over checked boxes? Weighing a response to a
22 checked box and a list of items, would you be more likely to
23 weigh a verbal answer in court or the checked box?

24 A. That's one of those things you have to -- you have to
04:39 25 determine when you're listening to it.

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04:39

1 Q. Okay. Please turn to Tab 8, which contains -- no.

2 Actually, we'll turn to Tab 11 -- excuse me --
3 which contains juror information for Seated Juror Pearl
4 Plander.

04:40

5 THE COURT: Did you say 8, Tab 8?

6 MR. GRAY: No. Excuse me, your Honor. If I said
7 that, I misspoke. Tab 11, for Pearl Plander.

8 THE COURT: Okay.

9 BY MR. GRAY:

04:40

10 Q. Okay. Ms. Plander checked that she agreed with Item 11, "I
11 think that return to the whipping post would be more effective
12 than capital punishment," and with Item 19, on the next page,
13 "Capital punishment is the most hideous practice of our time."
14 And the latter response, 19, was both circled and underlined.

04:41

15 Based on those responses, why was Ms. Plander an
16 acceptable juror?

17 A. I don't know, unless we just felt like, from listening to
18 her and watching her, that she would be fair.

19 Q. Do you recall whether you asked her about her response to
20 Item 19, "Capital punishment is the most hideous practice of
21 our time"?

22 Or -- excuse me.

23 A. Was she asked about it on voir dire? I don't know.

24 THE COURT: Wait a minute. I'm sorry. I must have
25 the wrong page written down. Tab --

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04:41 1 THE WITNESS: Tab 11.

2 MR. GRAY: I'm sorry, your Honor. We are at Tab 11.

3 THE COURT: Right.

4 MR. GRAY: And we're talking about the sheet of paper
04:41 5 that's just before the blue thing, the blue sheet that divides
6 the juror questionnaires and the testimony transcripts.

7 THE COURT: Okay. I got you. I just got lost.

8 MR. GRAY: All right. And the response we've been
9 discussing is the first response on the top of the second page.

04:42 10 THE COURT: Right, Number 19. I was in the wrong
11 place.

12 So, what was the answer? Why was she an
13 acceptable juror?

14 THE WITNESS: I can't tell him from that -- from that
04:42 15 question. I don't know.

16 THE COURT: Does that question make it sound like she
17 would be a good juror for the State?

18 THE WITNESS: No. No, it's not particularly a good
19 answer for the State. But that's not the only thing we
04:42 20 consider. And when you -- you can pick everything to pieces
21 like that; but it's the totality of the one hour we get to
22 spend with them and watch them and listen to them, see if they
23 feel comfortable with themselves.

24 BY MR. GRAY:

04:42 25 Q. Well, you obviously noticed that answer when you reviewed

Gray Cross of Davenport

04:43 1 her materials. In your normal practice, would you have asked a
2 juror about an answer like that?

3 A. Probably, yeah.

4 Q. Before accepting them?

04:43 5 A. Yes.

6 Q. But you don't recall whether you asked her about that in
7 this instance?

8 A. No. And I don't remember even which one of us questioned
9 her.

04:43 10 I did.

11 Q. Are we ready to move on to the next topic in the affidavit?

12 A. Sure.

13 Q. In your declaration, you state that you struck --

14 THE COURT: Well, I tell you what. Let's call it a

04:44 15 day here. I was going to quit at 4:45 so I could talk to these
16 folks for a few minutes. So, we're almost there. So, let's
17 stop with that.

18 Gentlemen, sir, who's there with Mr. Rosales,
19 please? Sir?

04:44 20 MR. MCKEE: I am.

21 THE COURT: Hi. Good afternoon, sir. What's your
22 name? I'm sorry.

23 MR. MCKEE: Richard McKee [phonetic].

24 THE COURT: Mr. McKee, we're going to have to resume
04:44 25 in the morning; and I wanted to know what is the earliest time

04:44

1 that we could potentially resume in the morning, in terms of
2 your being able to get Mr. Rosales there for us.

3 MR. MCKEE: I'm going to have to see if we're going to
4 have somebody here tomorrow. I'm not here tomorrow.

04:44

5 THE COURT: Okay.

6 MR. MCKEE: And if we've got somebody here, we can
7 resume probably as early as 8:30, 9:00 o'clock, 10:00 o'clock,
8 whenever you want to resume.

9 THE COURT: Okay. Well, I was --

04:44

10 MR. MCKEE: But we'll have to --

11 THE COURT: I was hoping that we could potentially
12 resume at 9:00 in the morning.

13 MR. MCKEE: We'll have to get that okay'd through
14 Huntsville still.

04:45

15 THE COURT: Could you say that one more time?

16 MR. MCKEE: Huntsville has still got to okay that for
17 us to do that.

18 THE COURT: All right. And what is that process?
19 What will that involve in terms of making sure we can get
20 that --

21 MR. MCKEE: The same as setting up as for today.
22 You-all will have to get with Huntsville and ask them if they
23 can do it today and get their okay. I can't okay it.

24 THE COURT: Oh, they just gave you the order to get it
25 done?

0 4 : 4 5 1 MR. MCKEE: Yes, ma'am.

2 THE COURT: All right. And, so, we would have to go
3 back through the same process?

4 MR. MCKEE: Yes, ma'am.

0 4 : 4 5 5 THE COURT: Can we do that before the end of the day?

6 THE CASE MANAGER: I can move on it.

7 THE COURT: All right. So, you're saying it won't be
8 you, it will be whoever Huntsville says for -- to get it done.
9 Is that correct? To get Mr. Rosales there.

0 4 : 4 5 10 MR. MCKEE: I'm the one that's supposed to be doing
11 it, but I'm going to be in Austin tomorrow.

12 THE COURT: Okay. So, if you're not there, will there
13 be somebody else who can get him over there for me?

14 MR. MCKEE: I will make sure that they are, yes,
0 4 : 4 6 15 ma'am.

16 THE COURT: Thank you. Thank you, Mr. McKee.

17 MR. MCKEE: You're welcome.

18 THE COURT: So, we're going to go ahead and adjourn
19 for the day. Well, just give us one second.

0 4 : 4 6 20 Lawyers, anything else, then, that we need to
21 talk about today? Because my only issue is I got to get
22 Esthela -- she's got to get out of here to make sure she gets
23 that done.

24 So, let's just make this assumption. Let's make
0 4 : 4 6 25 the assumption that we should start at -- maybe we should push

04:46 1 it back to what? To 9:30? What do you think?

2 THE CASE MANAGER: That's fine.

3 THE COURT: You think?

4 THE CASE MANAGER: I'll see if I can get them to do it
04:46 5 for 9:00 but --

6 THE COURT: Okay. Let's just try to be here for 9:00
7 o'clock; and, hopefully, we'll be able to have everything in
8 place to start at 9:00 o'clock or thereabouts. And, you know,
9 we'll do what we can to make sure we have it all in place for
04:46 10 him to be able to be here by 9:00 o'clock in the morning. So,
11 let's just sort of plan on being here at 9:00 o'clock; and
12 we'll just start as soon as we can.

13 And if it doesn't work for 9:00 o'clock, at least
14 we'll know at 9:00 o'clock in the morning what time you guys
04:47 15 need to come back here.

16 So, go ahead, get that done.

17 So, Mr. Rosales, hopefully we will be resuming at
18 9:00 in the morning. We're going to be checking with the folks
19 up in the Huntsville right now to make sure we can get you
20 pulled to come over and do this video teleconference with us
21 first thing in the morning.

22 MS. SWARNS: Your Honor?

23 MR. ROSALES: Thank you, your Honor.

24 THE COURT: Hold on one second, Mr. Rosales.

04:47 25 MS. SWARNS: I just wanted to bring to your attention

04:47

1 that Mr. Dow has argument in the Fifth Circuit tomorrow; so, he
2 is not going to be able to be with us. But myself and Mr. Gray
3 will be here and ready to proceed.

04:47

4 THE COURT: Okay. That's fine. And that's okay with
5 you guys?

6 MS. SWARNS: Yes.

7 THE COURT: Okay. So, then, we'll go ahead and resume
8 first thing in the morning, because it's just -- obviously, it
9 just takes a little bit longer to get through all of this
04:47 10 evidence. There's just a lot to get through.

11 So, we'll make sure that we get started hopefully
12 tomorrow. And if we can't get the folks in Huntsville on tap
13 to get it done tomorrow, it will have to be the next day.

14 I know you're from out of town, but --

04:48 15 MS. SWARNS: With respect to scheduling, I have an
16 appearance in Arkansas on the 1st.

17 THE COURT: What day is that?

18 MS. SWARNS: That's Thursday.

19 THE COURT: That's Thursday, isn't it?

04:48 20 MS. SWARNS: So, yes. I'm scheduled to fly out on --

21 THE COURT: It's up to you guys. I mean, you-all
22 are -- you-all are the ones that are sort of setting the pace
23 for this thing. If we stop reading all the depositions, we
24 could get through it all.

04:48 25 MS. SWARNS: Yes. I understand, your Honor. We're

04:48 1 trying. As you know, it's a very long voir dire proceeding.
2 We're trying to get through it as quickly as we can.

3 I guess the proposition would be that if we're
4 unable to finish, your Honor, by tomorrow, could we reschedule
04:48 5 for another day after this week, just because I have to be
6 in -- I'm ordered to be in court in Arkansas.

7 THE COURT: Well, I don't know. I have to ask
8 Esthela. She's the boss.

9 MS. SWARNS: Okay. I understand. But we could --

04:48 10 THE COURT: I don't have a clue. She had to run
11 upstairs to figure out what was going on tomorrow.

12 MS. MIRANDA: And I don't have any objection to that.
13 I was just wondering, for clarification, if we have all day
14 tomorrow or if we only have in the morning.

04:48 15 THE COURT: Tomorrow, I'm free. I have one thing late
16 in the day tomorrow.

17 MS. MIRANDA: Okay.

18 THE COURT: Something at, like, 4:00 o'clock in the
19 afternoon. So, that's what Esthela was running up to check on
04:49 20 for me a little bit earlier. And, so, you know, I'm
21 potentially free basically the whole day tomorrow.

22 MS. SWARNS: Okay.

23 MS. MIRANDA: Okay.

24 MS. SWARNS: We're fine the whole day.

04:49 25 MS. MIRANDA: Yeah, us, too.

04:49 1 THE COURT: Okay. So, you know, maybe we can get
2 through by the end of the day tomorrow.

04:49 3 But I'm potentially free the whole day. I have
4 one thing on my calendar for tomorrow. It was 4:00 o'clock in
5 the afternoon. And, so, you know, presumably we'll be tired by
6 4:00 o'clock in the afternoon.

7 So, I'll see you guys 9:00 o'clock in the
8 morning.

9 A CLERK: All rise.

10 *(Proceedings recessed for evening)*

11 * * * * *

12 COURT REPORTER'S CERTIFICATION

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled cause.

15 Date: July 21, 2008

17 _____
18 /s/ Cheryll K. Barron
19 _____
20 Cheryll K. Barron, CSR, CMR, FCRR
21 Official Court Reporter
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23
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